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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ADIDAS AMERICA, INC., an Oregon corporation;  
and ADIDAS AG, a foreign entity,

Plaintiffs,

v.

21 Civ. 5615 (JSR)

THOM BROWNE, INC., a Delaware corporation,

Defendant.

New York, N.Y.  
January 3, 2023  
9:30 a.m.

Before:

HON. JED S. RAKOFF,

District Judge  
-and a Jury-

APPEARANCES

KILPATRICK TOWNSEND & STOCKTON LLP

Attorneys for Plaintiffs

BY: R. CHARLES HENN, JR.

H. FORREST FLEMMING III

WOLF GREENFIELD & SACKS, PC

Attorneys for Defendant

BY: ROBERT MALDONADO

HARLEY LEWIN

BRYAN CONLEY

TONIA SAYOUR

ALSO PRESENT:

NITA GRAY, adidas paralegal

MICHAEL PUSTERLA, Thom Browne paralegal

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(Case called)

THE DEPUTY CLERK: Will everyone please be seated and would the parties please identify themselves for the record. Please be seated.

MR. HENN: Good morning, your Honor.

My name is Charlie Henn with the firm of Kilpatrick Townsend. Also with me today is Forrest Flemming representing adidas, and sitting next to me is adidas' associate general counsel, Sara Vanderhoff.

MR. MALDONADO: Good morning, your Honor.

Robert Maldonado with Wolf Greenfield representing the defendant, Thom Browne, Inc. With me today is Harley Lewin, Bryan Conley from my firm, and Mike Pusterla. Also with me today is Mr. Thom Browne from Thom Browne.

THE COURT: Good morning. Of course each party can have one nonlawyer representative at the client and counsel table, but all other witnesses are immediately excused and must not appear in the courtroom except when they are testifying.

So if there is anyone right now who is a witness in the courtroom, please usher them out.

I'll deal in one second with the motions in limine. First just to go over, I think I may have gone over this previously, just to make sure. We will pick nine jurors. I use the so-called jury box method of selection. So my clerk is handing you a draft jury preliminary instruction we'll get to

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1 in a minute.

2 I will question those nine for cause. Any are  
3 excused, we'll then randomly select someone from the panel to  
4 replace them. Then we will have the peremptory challenges,  
5 three challenges per side. We do this in rounds, so my  
6 courtroom deputy will hand you a board. She's holding it up  
7 right now. It will have cards for each of the nine jurors  
8 arranged by their number. And so then plaintiff first will  
9 turn over the one that they are challenging on this round, then  
10 the board will be handed to the defense counsel who will turn  
11 over the one that they are challenging. That way the jury,  
12 when we announce who is being excused, doesn't know who  
13 challenged whom. If you waive your challenge in a given round  
14 but the other side does not, then you have lost that challenge,  
15 but you haven't lost your remaining challenges. However, both  
16 sides waive in a given round, then that's our jury.

17 Any questions about any of that?

18 Very good.

19 How long does plaintiff's counsel want for opening  
20 statement?

21 MR. HENN: Your Honor, I think it will take me between  
22 an hour, hour and 15.

23 THE COURT: No way. Absolutely no way.

24 The most I ever give for opening statements is a half  
25 hour, and the reason for that is because the jury is just

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1 hearing all this stuff for the first time. For them to hear  
2 minute details is a total mistake. May not be a mistake from  
3 your standpoint, but I have had the pleasure of talking to over  
4 300 juries since I went on the bench, and they get confused if  
5 they hear more than basic principles. So half hour for each  
6 side.

7           With respect to the preliminary instruction, my  
8 practice is to give this to the jury before the opening  
9 statements, and it just alerts them to some of the issues. For  
10 the same reason I keep the opening statements short, I don't  
11 give every issue. So, for example, the laches defense is not  
12 mentioned in my preliminary instruction, even though that will  
13 be, of course, part of the final instructions to the jury.  
14 Similarly, I only mentioned about four of the *Polaroid* factors,  
15 not all eight. This is just to give them a kind of heads up.  
16 Nevertheless, we'll take a break in a few minutes and you can  
17 look it over. And if you have any objections or additions, you  
18 can give them to me now.

19           With respect to the motions in limine -- and before I  
20 rule, let me remind everyone that, first, motions in limine are  
21 not mentioned anywhere in federal statutes or rules. They are  
22 an artificial creation of judges to help the court and the  
23 lawyers streamline the case, but there is often a mistake about  
24 what it means.

25           So, for example, if I deny a motion to exclude

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1 evidence of X, that doesn't mean that when evidence of X is  
2 offered, a party still can't raise any other objection that  
3 wasn't raised in their motion in limine, like hearsay or  
4 foundation or some routine objection of that sort. So it's  
5 just dealing with, if you will, the categorical issues, not the  
6 specific proof being offered.

7 Also, as to any evidence that I exclude, if the door  
8 is later opened to that evidence in a way that would be unfair  
9 not to let the other side respond, then that will modify the  
10 motions in limine.

11 So against that background, I should also note that  
12 while the defendant did not make any motions in limine, I  
13 wasn't disappointed because adidas favored me with eight  
14 motions.

15 (Discussion off the record)

16 There are some motions. I'm sorry. I'll have to look  
17 at that during the break. I misunderstand what my law clerk  
18 had told me. Anyway, we'll deal now with adidas' motions.

19 First, the first motion is to exclude evidence  
20 allegedly rendered moot by my summary judgment opinion. That  
21 motion is denied except as to the issue of evidentiary  
22 prejudice. As to that, it is granted in accordance with my  
23 summary judgment motion. So no evidence of evidentiary  
24 prejudice can be asserted when dealing with the laches issue.

25 With respect to the second adidas motion to preclude

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1 the defendant from arguing its laches defense as to the  
2 Grosgrain design. That motion is granted, but I think it's  
3 pretty clear that Thom Browne did not timely raise that  
4 defense.

5 With respect to the third adidas motion to exclude  
6 expert Brian Sowers from testifying about his so-called fame  
7 surveys. That motion is denied, but again I want to stress  
8 that there may be more narrow evidentiary questions that arise  
9 with respect to his testimony in that regard.

10 With respect to adidas' fourth motion to preclude the  
11 testimony of Joanne Arbuckle in various respects, I deny that  
12 motion to the extent that she is going to testify as to third-  
13 party use, but I grant the motion as to the portion of her  
14 rebuttal testimony about the blurring of lines between  
15 mass market and desired goods and other similar testimony.

16 With respect to adidas' fifth motion in limine  
17 regarding certain third-party use evidence, that motion is  
18 denied.

19 With respect to the sixth motion in limine regarding  
20 foreign activities, that motion is denied.

21 With respect to the seventh motion in limine regarding  
22 adidas' 2002 man-on-the-street interviews, that motion is  
23 denied.

24 With respect to adidas' eighth motion in limine asking  
25 for exclusion of any evidence that adidas has itself infringed

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1 on Thom Browne's designs, that motion is granted.

2 Now, I'm sorry to say that somehow over the long  
3 weekend I was unaware that there were three or four motions in  
4 limine from Thom Browne. I will go look at them right now.  
5 We'll have a little time before the jury panel is ready and  
6 when I return. I'll give you my rulings on those.

7 With respect to objections during the trial, I don't  
8 allow speaking objections in front of the jury. So what you do  
9 is, if someone asks a question and you want to object, you say  
10 either the one-word objection or you say one additional word  
11 like hearsay, foundation, something like that, or you can say  
12 up to three words, mainly objection, rule X, Rule 403, for  
13 example. That's it. If you need to have a greater  
14 explanation, ask for a sidebar, and within reasonable limits, I  
15 will grant that and will hear you at the sidebar. But I don't  
16 like the jury to hear any of this.

17 Linda, when do you think the jury panel will be ready?

18 THE DEPUTY CLERK: They told me to call back at ten  
19 o'clock, in ten minutes, to find out when they will be for us.

20 THE COURT: All right. I will take ten minutes to  
21 look at the defense motions in limine. We'll reconvene at ten  
22 o'clock, I'll give you my rulings then and hear anything else  
23 anyone wants to raise with the court, and we'll tell the jury  
24 administrator to bring up the jury at 10 minutes after ten.

25 Yes?

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1           MR. MALDONADO: May I ask a question for clarification  
2 on your first ruling on the issue of evidentiary prejudice?

3           THE COURT: Yes.

4           MR. MALDONADO: I want to clarify we will be able to  
5 put on testimony that certain documents have been lost and not  
6 argue prejudice but that, for example, sales records are  
7 incomplete, so they don't represent the full extent of sales  
8 and without arguing prejudice.

9           THE COURT: Well, I mean, that's a good example of  
10 something that I can only really deal with at the moment you  
11 offer it. I think what you say is probably right, but I  
12 haven't heard your adversary.

13           And what I've learned, another reason I really don't  
14 care for motions in limine, is that as the trial progresses,  
15 things become much more defined. I'll be able to give a much  
16 more specific answer. So when you get to that point, then just  
17 approach the sidebar and say, Judge, we're ready to offer this  
18 evidence, and I'll hear your adversary and rule right then and  
19 there.

20           MR. MALDONADO: Thank you, your Honor.

21           THE COURT: Anything else?

22           OK. Very much looking forward to this trial so we'll  
23 take a ten-minute break and then resume at ten o'clock.

24           (Recess)

25           With respect to Thom Browne's motions in limine, the



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1 first defendant's motion in limine is to exclude the social  
2 media post exhibits. That motion is denied.

3 The second motion is to exclude proposed exhibit  
4 Plaintiff Exhibit 0279, a 2009 Brand Loyalty in the U.K.  
5 Sportswear Market. That motion is granted.

6 The third motion is to exclude any reference to other  
7 court's findings concerning adidas' Three-Stripe Mark. Now I'm  
8 skeptical that that will be admissible, but I don't think I can  
9 rule on it definitively right now because the assertion of  
10 these is that there will be evidence that adidas will offer  
11 that Thom Browne knew about these rulings, in which case it  
12 might become relevant. Although I can also see possible 403  
13 issues there as well.

14 I'm technically denying the motion now but without  
15 prejudice to it being reraised when specific proffers are made.  
16 And, again, when you're about to offer any testimony about a  
17 prior court's ruling, plaintiff's counsel should approach the  
18 sidebar so we can work this out before the jury hears it  
19 anyway.

20 With respect to the motion to exclude the testimony of  
21 Dr. Erich --

22 MR. HENN: He pronounces it Joachimsthaller.

23 THE COURT: Pardon me?

24 MR. HENN: Joachimsthaller.

25 THE COURT: Of course. J-o-a-c-h-i-m-s-t-h-a-l-e-r,

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1 the standard spelling.

2 So to the extent the motion is to exclude his  
3 testimony with respect to the Batch of Sport or the Trefoil  
4 logos, that is denied. To the extent, however, that it is  
5 directed at his testimony that relies on the 2009 survey, that  
6 is granted.

7 With respect to the final motion to fully exclude the  
8 testimony of William D'Arienzo, that motion is denied. But I  
9 think there are limits to his testimony, so at a break shortly  
10 before he testifies, counsel should raise exactly what they, at  
11 that point in the case, seek to elicit from him and we'll deal  
12 with that during a break. I don't like long sidebars. I think  
13 that one may take a while. We'll do that during a break.

14 Speaking of breaks, our normal schedule will be that  
15 the jury will sit from 9:30 to 4:30 with a midmorning break  
16 around 11, 11:15, and a lunch break between one and two, and a  
17 midafternoon break around 3:15 or so.

18 Counsel, however, need to be here at nine a.m. each  
19 morning because, from experience, you will have thought of  
20 things overnight that need to be discussed. So we'll take them  
21 up at nine o'clock.

22 How are we doing on a jury?

23 THE DEPUTY CLERK: They are awaiting my call and will  
24 bring them up directly right now.

25 MR. MALDONADO: Your Honor, we have objections to

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1 resolve on plaintiff's opening. Do you want to do that now?

2 THE COURT: Yes. We also need to go over the  
3 preliminary instruction. Thank you.

4 Let's first go over the --

5 By the way, the people in the audience, when the jury  
6 panel comes in, you just need to move to the back, furthest  
7 back bench, so the jury panel can be in the closer benches.

8 Thank you.

9 With respect to the preliminary instruction, any  
10 objections, additions, or edits from plaintiff's counsel?

11 MR. HENN: Your Honor, adidas objects to the use of  
12 the reference to adidas owning trademarks plural and several  
13 designs plural, which is in the first sentence of the third  
14 paragraph.

15 As your Honor is aware, Judge Lehrburger, Magistrate  
16 Judge Lehrburger took this issue up on an early motion in the  
17 case and concluded that adidas' Three-Stripe Mark is a mark and  
18 that a mark can be covered by multiple registrations, which is  
19 well established by many courts.

20 THE COURT: I'm sorry. What in that sentence are you  
21 objecting to?

22 MR. HENN: Plaintiff only owns one trademark in this  
23 case, your Honor.

24 THE COURT: Pardon?

25 MR. HENN: We only own one trademark in this case, it

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1 is the Three-Stripe Mark, and the sentence begins here.

2 THE COURT: OK. All right. So you would have it  
3 read: Plaintiff adidas owns --

4 MR. HENN: A trademark.

5 THE COURT: -- a trademark --

6 MR. HENN: Involving three parallel stripes.

7 THE COURT: -- involving three parallel stripes that  
8 collectively are called the Three-Stripe Mark.

9 MR. HENN: That's correct, your Honor.

10 THE COURT: That's fine.

11 Anything else?

12 MR. HENN: Not from us, your Honor.

13 THE COURT: Defense counsel?

14 MR. MALDONADO: Well, your Honor, I guess we would  
15 object to that change. We don't believe that there is a single  
16 trademark. We believe there are several trademarks that  
17 correspond to several different registrations that the  
18 plaintiff owns. And in addition, the plaintiff asserts common  
19 law trademarks in this case. We don't concede ownership of  
20 those common law trademarks, and the plaintiff bears the burden  
21 of proving that those common law trademarks are owned by it and  
22 have the same meaning.

23 THE COURT: For these limited purposes, because that's  
24 an interesting issue, but with respect to the sentence we just  
25 went over, Here the plaintiff adidas owns at least one

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1 trademark.

2 OK. That solves your problem. It still leaves it  
3 open.

4 MR. MALDONADO: OK.

5 THE COURT: You're not disputing they own at least one  
6 trademark?

7 MR. MALDONADO: We are not disputing that. That's  
8 correct, your Honor.

9 THE COURT: What's your second point? I'm sorry.

10 MR. MALDONADO: The second point we have is that we do  
11 believe it would be appropriate to include some reference to  
12 the laches defense in the preliminary instruction.

13 THE COURT: I went back and forth on that.

14 OK. Let me see. How about this -- this would be at  
15 the very end of the third paragraph -- the previous sentence  
16 is: Thom Browne, however, argues the designs are not similar  
17 to adidas' three-stripe design, I guess we should say, and have  
18 not confused consumers or polluted adidas' Three-Stripe Mark.

19 And we would add this: it also argues that adidas  
20 delayed too long in bringing this suit and that defendant was  
21 prejudiced by the delay.

22 OK.

23 MR. MALDONADO: That's acceptable.

24 THE COURT: The reason I had left it out originally  
25 was laches would mean nothing to this jury. They will

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1 understand it by the time we give them final instructions, but  
2 not now.

3 MR. MALDONADO: OK. Thank you.

4 THE COURT: All right. With those changes, that will  
5 be it.

6 Now there was an objection to some slides that  
7 plaintiff's counsel was going to use in his opening statement.

8 MR. MALDONADO: Yes. I don't know --

9 THE COURT: His truncated opening statement.

10 MR. MALDONADO: I don't know if the slides had  
11 changed. Maybe we can discuss that.

12 MR. HENN: I did try to reduce some of these issues  
13 when you set a time limit, your Honor. I pulled some of them  
14 out. The only lingering objection on the list that was  
15 provided to me last night is that on a couple of the slides I  
16 list the elements. So, for example, I list the *Polaroid*  
17 factors on a slide, and I list the two elements of dilution.

18 And counsel informed me last night they object to me  
19 telling the jury what the elements they should be thinking  
20 about are.

21 THE COURT: I certainly don't object to you listing  
22 the *Polaroid* factors, and I take it that's not the objection.

23 MR. MALDONADO: Correct.

24 THE COURT: What do you say about dilution, or what  
25 does your slide say about it?

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1           MR. HENN: Yes. I just modified it to track your  
2 preliminary instruction again to avoid any concern. It is a  
3 slide -- I wish I could pull it up -- but it says, one  
4 Three-Stripe Mark is famous (federal law or distinctive state  
5 law), and then it says two, the accused products undermine the  
6 distinctiveness of the Three-Stripe Mark, and then I have  
7 blurring in quotes underneath.

8           THE COURT: No, I think that's too much in instruction  
9 of law which is reserved to the court. I will strike that.

10           You can give them a general idea in your opening about  
11 what you think you will need to prove there, but nothing like  
12 what you just described.

13           MR. HENN: OK.

14           THE COURT: All right.

15           MR. MALDONADO: There is also a slide where he talks  
16 about the elements for laches. I don't know if you still have  
17 that in there. We also object to that.

18           THE COURT: Same ruling.

19           MR. MALDONADO: OK.

20           THE COURT: He can describe it pretty much as I just  
21 described it and then fill in a little bit of the details.

22           MR. MALDONADO: Then the other issue I think we have  
23 is their reference to an exhibit that we object to, Plaintiff's  
24 Exhibit Number 50, which concerns a study that was done many  
25 years ago. It was referenced in one of their expert reports,

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1 Joachimsthaler's report. And it was a survey, basically, that  
2 was done by another person who is not testifying and who is not  
3 a witness and just cited in the report, and they want to rely  
4 on that survey.

5 We believe it is hearsay and we don't believe it  
6 should be referenced, not in the opening statement. If they  
7 want to bring it in the case, we can deal with evidentiary  
8 objections at that time.

9 THE COURT: Of course an expert, in giving testimony,  
10 can rely on hearsay, but that doesn't mean necessarily that the  
11 report will come in.

12 MR. MALDONADO: Or it should be presented to the jury.

13 THE COURT: Putting aside the hearsay objection, which  
14 I don't think is an objection to, I think a proper question to  
15 an expert is what did you rely on in forming your opinion, and  
16 some of that is going to be hearsay.

17 But the rule goes on to say that it ultimately has to  
18 be admissible, which is the point you're making.

19 MR. MALDONADO: Right.

20 THE COURT: So let me hear on that from plaintiff's  
21 counsel.

22 MR. HENN: So I took that slide out earlier this  
23 morning.

24 THE COURT: OK.

25 MR. HENN: We limited it with regard to opening.



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1           However, our very first witness, Mr. Murphy, who will  
2           presumably begin this afternoon, is going to introduce that  
3           exhibit. And just to provide context, adidas has a group, they  
4           call it insight, and all they do is market research. And he is  
5           going through, I think, six market research decks that were  
6           commissioned by adidas. He is going to explain to the jury  
7           what the methodology was and the finding was of each study.

8           For some reason that I cannot figure out, defendants  
9           don't object to them. They picked one out of all of them to  
10          object to. It's the same basis for all of them. This is  
11          research commissioned by the company. We have a witness to  
12          explain methodology. He'll explain what the findings are,  
13          which are written in a report. He doesn't offer any opinions  
14          about what to do with that.

15          We saved that for Dr. Joachimsthaler, who will then  
16          say I relied on those studies and here are my opinions as an  
17          expert in this area.

18          THE COURT: So he's going to authenticate and describe  
19          the methodology of these various reports and even though he  
20          himself did not prepare the report?

21          MR. HENN: That's correct.

22          It was commissioned by the company, and he's the vice  
23          president of marketing who is involved in receiving these  
24          reports from those companies. But the business record of  
25          adidas, I know --

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1 THE COURT: I know that's what you're trying to make  
2 it. I'm not so sure it's a business record.

3 Let me hear from defense counsel.

4 MR. MALDONADO: Your Honor, first, one point we would  
5 like to make is that the report itself, which I haven't seen --

6 THE COURT: Wait a minute.

7 THE DEPUTY CLERK: The jury is in the hallway.

8 THE COURT: We will continue this discussion after we  
9 pick the jury. I'm going to give them a 15-minute break, and  
10 that will be the time.

11 By the way, we will then probably have opening  
12 statements before lunch. Just be aware of that.

13 MR. MALDONADO: OK.

14 THE COURT: Bring in the jury panel, please.

15 (Jury selection followed)

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(In open court; jury not present)

THE COURT: So after we selected the jury, but before a reporter was back, we had a further colloquy on one of the exhibits that plaintiff's counsel is going to mention in his opening and, more importantly, is going to offer through his first witness. And I was satisfied that it was a business record because part of the business is to put out these questions to customers and others and then simply record as a mathematical matter what the responses are. And this was just one of those charts of the responses by numbers.

An additional objection was raised that parts of the document were unreadable. I think actually most of it was readable. It's an old document. Some of it is faded, but, more importantly, the only four parts that are being offered were clear, and so that sufficed for the purpose of the Court's rulings.

Now, plaintiff's counsel had one or two other things he wanted to raise.

MR. HENN: Really, this is just, your Honor, because I haven't tried a case in your courtroom, and I don't want to run afoul of your preference on things. The first is with regard to experts.

THE COURT: If you run afoul of my preferences. All I will do is ream you out in front of the jury. It won't be anything you won't -- go ahead.

N13Qadi2

1 MR. HENN: I would expect nothing less, your Honor.

2 So, first is with regard to experts. Are you someone  
3 who wants us to formally proffer them as experts?

4 THE COURT: No. In fact. The Second Circuit -- and  
5 I'm sorry that this decision that came out about 20 years ago  
6 hasn't received greater publicity. The Second Circuit  
7 specifically disapproves of that because it's the jury's  
8 function to determine whether a person is an expert or not. I  
9 make a preliminary determination just for admissibility  
10 purposes, but like all admissibility rulings, that shouldn't be  
11 shared with the jury.

12 MR. HENN: Thank you.

13 The second was with regard to the motions in limine  
14 that your Honor denied, I understood that you left the door  
15 open to object on other bases if the same evidence was offered  
16 or was offered during the trial.

17 But am I to understand that we do not need to  
18 re-assert the basis for the motion in limine. The filing of it  
19 and your ruling is sufficient to preserve the issue.

20 THE COURT: Yes.

21 MR. HENN: Thank you.

22 The next is just to alert you to an agreement between  
23 counsel and make sure this didn't strike you as weird. The  
24 last two witnesses from whom we will obtain some evidence, or  
25 the last several witnesses from whom we will obtain evidence in

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1 our case in chief, are defense witnesses, and the parties  
2 agreed that rather than us calling them out of order and  
3 calling them as a hostile witness and doing all that, we would  
4 simply wait and rest our case after we had been through  
5 relevant witnesses rather than call on redirect.

6 THE COURT: That's fine. I think that's a good idea.

7 MR. HENN: The next is Hal Poret is an expert witness  
8 who is currently undergoing cancer treatment and actually  
9 begins this week, tomorrow, and his treatments are in town in  
10 the afternoons. And it's all day Friday. So we are aiming to  
11 call him Thursday morning. We alerted the Court to this in a  
12 footnote in our witness list. We may need to call him out of  
13 order just to avoid that treatment issue. Defense has  
14 indicated they have no objection to that. I just wanted you to  
15 know what we are doing.

16 THE COURT: That's fine.

17 MR. HENN: Next is movement around the courtroom. In  
18 terms of opening, I understand that I can use this podium.  
19 What about with witnesses?

20 THE COURT: So now my wife's and my hobby is ballroom  
21 dancing, and you're free to engage in that. But putting that  
22 aside, when you're giving opening and closing statements, you  
23 can be at the little podium that you've already set up right  
24 now right in front of the jury. But when you're questioning  
25 witnesses, you need to go to the rostrum in the back.

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1 MR. HENN: Will do.

2 The next issue is there are two Excel spreadsheets  
3 that we will offer during the first witness, Chris Murphy.  
4 They are extremely detailed summaries of adidas's marketing  
5 spent over a number of years. They're obviously highly  
6 confidential. We have a lot of people here. They might all be  
7 lawyers, I'm not sure, but there is a period during his  
8 testimony that we would ask that we seal the courtroom.

9 THE COURT: No. Never.

10 MR. HENN: All right.

11 THE COURT: I never do that.

12 MR. HENN: What about the document itself being under  
13 seal?

14 THE COURT: No. This is already in my individual  
15 rules, so you had fair warning of it, or in the agreement  
16 really that you all signed if you had my standard form  
17 agreement in this case on confidentiality, and it provides that  
18 all parties are put on notice that the Court is unlikely to  
19 seal or otherwise maintain confidentiality in a civil case to  
20 anything offered in during the course of a trial.

21 I think that is not forbidden by the Constitution but  
22 totally contrary to what the Constitution provides, which is  
23 that trials should be publicly available and open. So that  
24 request is denied.

25 MR. HENN: A couple more.

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1 Tom Becker is the former CEO of defendants. We intend  
2 to call him, his testimony we anticipate being fairly short.  
3 He was the one involved in that 2007 phone call with adidas.  
4 Since he is former CEO of Thom Browne, I intended to treat him  
5 as a hostile witness and cross-examine him or either by calling  
6 him on direct. I just didn't want a kerfuffle at the beginning  
7 of that examination.

8 THE COURT: That's fine. I'm getting a little  
9 concerned because we are holding up the jury.

10 MR. HENN: The last one, your Honor, is simply timing  
11 of the charge conference. Is that something you do at the very  
12 end or --

13 THE COURT: No, I do it about two days before the end.  
14 I will provide you all with a draft charge, give you at least  
15 overnight to look at it, and we will have a charging conference  
16 usually at the end of the day the next day. And so well before  
17 your summations you will know exactly what the charge is.

18 MR. HENN: Thank you.

19 THE COURT: Let's bring in the jury.

20 **(Jury present)**

21 THE COURT: You can be seated. Everyone else remain  
22 standing in deference to the jury.

23 You can be seated as soon as you come in. The only  
24 other person who doesn't stand while you're coming in is me  
25 because I'm an old guy, and I need to stay seated. Now

N13Qadi2

1 everyone can be seated

2 Ladies and gentlemen, before we hear opening  
3 statements, I'm going to read with you a preliminary  
4 instruction of law that you've all got a copy of, and then you  
5 can take the copy can with you into the jury room in case you  
6 want to consult it later. I want to stress, and you will see  
7 as we read it, this is just a heads-up as to some of the issues  
8 in the case. There will be much more detailed instructions  
9 later on that will replace this initial, but this is to give  
10 you a little idea of what's going on and what the disputes are.

11 So, turning to the instruction if I can find my  
12 reading glasses. There we go.

13 Before we begin, I want to give you a brief overview  
14 of the claims and some of the main issues in this case. After  
15 you hear evidence and the parties make their closing arguments,  
16 I will give you detailed legal instructions that will displace  
17 this preliminary instruction.

18 This is a civil lawsuit about trademarks. A trademark  
19 can be a word, name or symbol that indicates to consumers the  
20 source of a good. A trademark's owner has the right to stop  
21 others from infringing -- using the mark or something similar  
22 in a way that might confuse its customers about who is behind a  
23 particular product -- or diluting the mark -- causing customers  
24 to associate the mark with other products and undermining its  
25 distinctiveness.



N13Qadi2

1           Here, the plaintiff, adidas, owns at least one  
2 trademark involving three parallel stripes that it calls the  
3 Three-Stripe Mark. Adidas alleges that the defendant, Thom  
4 Browne, has infringed and diluted the Three-Stripe Mark through  
5 two of its own designs called the 4-Bar and Grosgrain  
6 signatures. Thom Browne, however, argues its designs are not  
7 similar to adidas's Three-Stripe design and have not confused  
8 customers or diluted adidas's Three-Stripe Mark. It also  
9 argues that adidas delayed too long in bringing the suit, and  
10 that defendant was prejudiced by this delay.

11           In determining who is right, you should consider all  
12 relevant factors such as, for example, consumer recognition of  
13 adidas Three-Stripe mark, its similarity or lack thereof to  
14 Thom Browne's designs, any evidence that consumers are actually  
15 confused, any evidence that Thom Browne intended consumers to  
16 associate its designs with adidas and other factors about which  
17 I will instruct you later.

18           Please remember that this preliminary instruction is a  
19 very brief overview of the claims and issues in this case.  
20 Before your deliberations, I will give you more detailed final  
21 instructions that will replace this overview.

22           Now, you are about to hear opening statements of  
23 counsel. I want to make sure you understand that nothing that  
24 counsel says is itself evidence. As I mentioned earlier, the  
25 evidence will come from the witnesses, from their testimony,

N13Qadi2

Opening - Mr. Henn

1 from exhibits that are received in evidence and from  
2 stipulations where the parties agree to a particular fact and  
3 those are the only sources of evidence.

4 So why do we even have opening statements? The answer  
5 is because the evidence is going to come in a little bit at a  
6 time, and as I mentioned earlier, it will take awhile before  
7 you see the full picture. So it will be useful, I think, for  
8 you to hear from counsel what they think the evidence overall  
9 will show or fail to show, and that's the reason we have  
10 opening statements. This kind of gives you a guidepost as to  
11 what's coming, but just remember it's not evidence. It's the  
12 competing views of the two counsel.

13 So with that introduction, let's turn first to  
14 plaintiff's counsel.

15 MR. HENN: Thank you, your Honor.

16 From its very origin, adidas has been rooted in sports  
17 and sportswear. Adidas was founded by a guy named Adi Dassler.  
18 He's depicted on your screen. You may not know this, but  
19 that's where the name adidas comes from, Adi Dassler. He was a  
20 cobbler who designed shoes and he was unique in two ways, the  
21 first was he was one of the first shoemakers in the world to  
22 focus on making shoes specifically for high-performing  
23 athletes. He had some of the earliest track spikes that Jesse  
24 Owens ran in the Olympics. He put the shoes on Dick Fosbury  
25 who did the Fosbury Flop the way people now do the high jump.

N13Qadi2

Opening - Mr. Henn

1 That was Adi Dassler.

2 So, on one hand, incredibly innovative in design. The  
3 other thing that he did that was so unique, he realized when  
4 these athletes were out on the field or the court or on the  
5 pitch, the soccer pitch, it was hard to tell whose shoes all  
6 these famous athletes were wearing. And so very early on in  
7 the 1940s, he decided I'm going to put three stripes on the  
8 side of these shoes so that even from a distance, everyone  
9 would know they came from Adi Dassler and ultimately adidas, or  
10 adidas.

11 This case is about that trademark, the Three-Stripe  
12 trademark. This trademark has been registered by the United  
13 States Patent and Trademark Office multiple times. Not only is  
14 it the registration you see on your screen here for the  
15 Three-Stripe Mark generally, it has been registered for  
16 specifically being applied to the sides of shoes, across the  
17 tops horizontally on slides or flip-flops. It's been  
18 registered to be used on the sides of jackets or shirts or  
19 pants or shorts or sweatpants or outerwear or track jackets or  
20 track singlets, I think they call them, on the sides there.  
21 That one trademark is famous, and the evidence will show that  
22 consumers across the United States are familiar with the  
23 Three-Stripe trademark of adidas. And when they see three  
24 parallel stripes on a product, they know that's adidas. That  
25 is what a trademark is. And that's what this case is about.

1           That trademark is so synonymous with adidas, the  
2 design mark is, that adidas has become known as the brand with  
3 the three stripes. You will even see a shoe where they wrote  
4 the phrase The Brand With The Three Stripes on the back of the  
5 shoe in multiple languages.

6           Not only does adidas use the Three-Stripe Mark on the  
7 sides of clothes, as we saw in those other pictures, but when  
8 they adopted individual logos for the company, they  
9 incorporated the three stripes into that. You may have seen  
10 that peaked-like mountain logo. Adidas calls that the Badge of  
11 Sport, the Badge of Sports. It's the three lines in a  
12 triangle. You'll hear testimony that that was created by  
13 taking the three stripes, angling it 30 degrees, three again,  
14 30 degrees, and then chopping the bottom off, and then making  
15 it into that logo.

16           The trefoil mark, some of you who are my age may know  
17 the trefoil was the mark back in the Seventies and Eighties for  
18 all of adidas's products. It has three leaves, again, playing  
19 on the Three-Stripe Mark notion, and then horizontally across  
20 that mark are the three stripes of the Three-Stripe trademark.  
21 Adidas has a corporate logo where they use three stripes  
22 horizontally next to the name adidas. So, in many ways the  
23 Three-Stripe Mark is in everything adidas does. It's in its  
24 advertising, it's marketing, its logos, even the name, the  
25 brand of the Three Stripes.

1           So why are we here? Well, as Judge Rakoff just  
2       advised you, we are here because adidas alleges that Thom  
3       Browne has infringed adidas's rights in the Three-Stripe Mark  
4       with two sets of designs. So what you see on your screen now  
5       are some of the products that adidas has accused of infringing  
6       based on Tom Browne's use of those parallel horizontal lines.  
7       Thom Browne has also used what it calls the grow grain or  
8       Grosgrain design, which is a red, white, and blue stripe that  
9       in some ways, in the ways adidas accuses of infringement, Thom  
10      Browne uses exactly in the classic adidas formation -- running  
11      down the side of a sweat pant, running down the side of a sweat  
12      jacket or hoodie, or in what is perhaps the most egregious, the  
13      shoes, where not only are those stripes on the side of the  
14      shoe; they are angled exactly like adidas stripes, they're put  
15      in the exact place of adidas stripes, and Thom Browne  
16      advertises these as sneakers and running shoes -- exactly what  
17      adidas sells. That's why we're here.

18           Now, the Judge has advised you in the preliminary  
19      instruction that what you are going to need to think about as  
20      you listen to the evidence is whether Thom Browne's use of  
21      those stripe designs is likely to confuse consumers. Likely to  
22      confuse. That's the phrase you're going to hear a lot. I put  
23      this slide up because adidas has limited the scope of what it's  
24      arguing in this case, and as you listen to the evidence, it's  
25      important for you to know what adidas is not arguing and what

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Opening - Mr. Henn

1 adidas is arguing.

2 So confusion in the marketplace can happen at three  
3 different times: Before you buy a product, at the moment  
4 you're at the register buying the product, and then after the  
5 product is bought and it's just being worn out in the  
6 marketplace. Those are referred to as initial interests  
7 confusion, the one before; point of sale where you're at the  
8 register; and post sale, where it's just somebody wearing it  
9 out in the marketplace.

10 Here, adidas alleges only that the use of these  
11 designs caused initial interest confusion and post sale  
12 confusion. Let me give you examples of how the evidence will  
13 show that occurs. Initial interest, two ways you can think  
14 about this. One is social media. Scrolling through your  
15 social media feeds, ads pop up. You see a Thom Browne product  
16 advertised scrolling through with the stripes. You think, "Oh,  
17 that's a neat adidas product." And then once you stop and you  
18 look before you actually buy it, you realize, "Oh, that's Thom  
19 Browne; that's not adidas." But you initially thought it was  
20 adidas. That's the initial part of the initial interest.

21 The other way this could happen is at a store. You're  
22 shopping at Nordstrom. You're walking through the Nordstrom.  
23 Both adidas and Thom Browne products are at Nordstrom. You see  
24 a rack of Thom Browne products with stripes on the sleeves or  
25 stripes going down the sweatpants, and you think, "Oh, those

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Opening - Mr. Henn

1 are neat adidas, I'm going to walk over and check those out."  
2 And then when you finally get to them and you realize they're  
3 selling them for a thousand dollars, and they've got Thom  
4 Browne's name on them, it's a Thom Browne product. But you  
5 were initially drawn in because you saw it from a distance.  
6 That's what initial confusion is.

7 Post sale confusion is the idea someone went into a  
8 Thom Browne store or went into a Nordstrom, knew they were  
9 buying Thom Browne, put it on, and, for example, some of those  
10 running products we looked at on the screen before, they put  
11 them on with the stripes and go running in Central Park. You  
12 happened to be walking through the park that day, and you see  
13 the person run by, and you see the stripes and because you're  
14 so familiar with adidas and the Three-Stripe Mark, you think,  
15 "That's adidas." That's called post sale confusion. It's  
16 members of the public seeing the product after the point of  
17 sale and being confused by it. That is what adidas alleges.

18 What adidas does not allege is that someone literally  
19 walks up to a register and spends \$2,000 for one of Tom  
20 Browne's puffy jackets and thinks, "I'm getting adidas." We do  
21 not allege that. So as you think about the evidence that you  
22 hear, please be focused on the initial interest component or  
23 the post sale component and don't worry yourself about someone  
24 walking up to a register and thinking they're buying something  
25 they're not.

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Opening - Mr. Henn

1           Okay. There are several factors that you will need to  
2 look at or think about as you weigh whether confusion is  
3 likely. These are the factors that you will consider, and  
4 there will be significant evidence weighing in adidas's favor  
5 on each of these. We will talk through them. The first is the  
6 strength of the Three-Stripe Mark. What that means is how  
7 well-known is it? How well-known are the three stripes of  
8 adidas, and do people when they see three stripes think adidas?

9           The evidence on this is overwhelming. The Three  
10 Stripes have been used in the United States since 1952 on  
11 dozens and hundreds and thousands and millions of products.  
12 The company spends on average \$300 million a year advertising  
13 the Three-Stripe Mark. Sales of products bearing the  
14 Three-Stripe Mark average over \$3 billion over the last decade.  
15 You pretty much can't be out in society and not encounter the  
16 Three-Stripe Mark and know that it's adidas. You will see  
17 images from catalogs dating back to the 1970s showing how  
18 adidas has used that mark on all kinds of products over a long  
19 period of time. And you will see that they used it in lots of  
20 different ways. They've used it with all stripes the same  
21 color. They've used it where the stripes are red, white and  
22 blue. They've used it vertically down the sides of pants.  
23 They've used it horizontally on sleeves of shirts.

24           Extensive sales. As I mentioned, on average over the  
25 last decade \$3.1 billion. There are tons of numbers on this



1 slide, but the one you need to focus on is in the circle.  
2 \$31 billion in sales just in the United States of apparel and  
3 footwear bearing the Three-Stripe Mark. Tons of advertising:  
4 Television, digital, social media, print advertising, billboard  
5 advertising, sponsored athletes, relationships with  
6 influencers. You're going to hear about all of the marketing  
7 efforts that adidas has undertaken over decades to create one  
8 of the strongest trademarks in America.

9 And those trademarks are acknowledged by the media,  
10 *The New York Times*, *Glamour Magazine*, *Sports Illustrated*. They  
11 refer to the iconic Three Stripes, the signature Three Stripes,  
12 the brand with the Three Stripes. In other words, all those  
13 efforts of sales, advertising and marketing, it worked, and the  
14 media talks about it and people know. So the markets the  
15 evidence will show the market is strong.

16 How similar are the parties' marks? Well, it's a  
17 Three-Stripe Mark. Thom Browne will argue we are using four  
18 bands. It's four, not three. It's four, so it's not three.  
19 But the evidence will show that when consumers see the four,  
20 they think three. The evidence from quantitative surveys will  
21 show that consumers see this design and think it's adidas. Now  
22 we don't necessarily know what's in those consumers minds, but  
23 you will see the data from the survey that when people say  
24 that, they say, "That's three stripes, that's adidas." Maybe  
25 they're miscounting the number of stripes or maybe what they're

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Opening - Mr. Henn

1 seeing between those white spaces are the three dark stripes.  
2 But these are similar marks, and the evidence will show it. As  
3 I mentioned, the shoes, the marks are incredibly similar: Same  
4 angle, same type stripe, same type shoe. Thom Browne's use of  
5 the red, white and blue Grosgrain in exactly the places where  
6 adidas has historically used the Three Stripes and where it is  
7 a registered trademark. So the evidence will show that the  
8 marks are incredibly similar.

9 The next is how similar are the parties' products in  
10 proximity, meaning are you likely to encounter them near each  
11 other? Are they proximate or close to one another? So, first,  
12 the goods that also adidas accuses in this case are incredibly  
13 similar. And let me pause and be very clear on something.  
14 Thom Browne, Mr. Browne, is very well-known for making tailored  
15 suits: Tight, short at the ankle, very close-fitting tailored  
16 suits. Adidas does not argue that those are likely to cause  
17 confusion. Adidas does not allege that those infringe.  
18 Similarly, he sells things like cashmere cardigans and dresses  
19 and other formal wear. Adidas does not allege that any of  
20 those are an infringement of its rights. That's his space.  
21 He's in formal wear and business attire and that sort of thing.

22 But over time Thom Browne, the company moved into  
23 sporting goods, and they started offering compression products  
24 and running products, just like adidas did. They started  
25 offering sweatpants and track pants. They started offering

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Opening - Mr. Henn

1 shorts and running shorts. They started offering T-shirts,  
2 just like adidas. They started offering collar shirts and polo  
3 shirts and golf shirts. They started offering jackets and  
4 hoodies and outerwear puffy jackets. This was a targeted  
5 attempt by Thom Browne to grow their sportswear business  
6 because, as we all know, with Covid and everything else, the  
7 suits other than in court are a thing of the past. And so you  
8 will see documents about them strategizing about the future.  
9 We've got to move into sportswear. We've got to move into  
10 compression products. And that's moving squarely into  
11 proximity with adidas.

12 Shoes, we already mentioned these. Not only are the  
13 stripe designs similar, but the products themselves are  
14 similar, and Thom Browne is advertising them as running shoes  
15 and sneakers. You think of adidas, what do you think of?  
16 Running shoes and sneakers. They are sold in some of the same  
17 stores. Thom Browne sells in all these locations. adidas  
18 sells in all these locations. Saks and Nordstrom and Bergdorf  
19 Goodman would be sort of physical stores. FARFETCH and  
20 Net-A-Porter, I was not familiar with these before this case.  
21 These are sort of high-end fashiony websites where you can buy  
22 products, but both products are sold there, so maybe you're not  
23 talking about point of sale confusion again, but as you think  
24 about where they overlap, think about that situation of initial  
25 interest of confusion. Is someone in the store likely to see

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Opening - Mr. Henn

1 it from a distance and think, "Oh, that must be adidas" because  
2 of the stripes.

3 We also see proximity because when people buy these  
4 products, there's no restriction on what they wear with Tom  
5 Browne's products. So, for example, here's a woman on a track  
6 wearing some of Thom Browne's running attire, and as it turns  
7 out, she's wearing adidas shoes, and she's even got adidas  
8 sunglasses. It's kind of hard to tell, but she has adidas  
9 sunglasses. There's a little badge of sport up on the eyebrow.  
10 And you might wonder, did Mr. Henn just take that and pose her  
11 like that for the purpose of this case? No. No. Thom  
12 Browne's own social media posted this image to advertise their  
13 running attire, clothing one of their models in adidas shoes  
14 and adidas sunglasses so there can be no doubt that these  
15 things can encounter each other nearby.

16 Another thing Thom Browne did as the company decided  
17 it needed to get into sportswear was they did deals in adidas's  
18 back yard. They signed a three-year deal with Barcelona, one  
19 of the most famous football soccer clubs in the world,  
20 featuring Lionel Messi, an adidas athlete for the last 15  
21 years, and one of the most iconic players in the world who just  
22 won the World Cup for Argentina, an adidas-sponsored team. He  
23 is known for being in the three stripes. They did a deal with  
24 Messi and Barcelona to outfit them in Thom Browne products.  
25 They also did a deal with the Cleveland Cavaliers. And Lebron

1 James is a customer. So they got involved in basketball and  
2 the NBA, where adidas had a long-term relationship with players  
3 wearing three stripes on the sidelines of every game.

4 As I mentioned, we don't know once someone buys these  
5 products what they're going to wear it with or how it's going  
6 to appear in the post sale environment. So you're going to see  
7 images of people bending their arms so you can't actually count  
8 whether it's four stripes. You're going to see examples from  
9 social media where people are photographed wearing a Thom  
10 Browne hoodie and adidas tennis shoes. You're going to see  
11 photos of people wearing those sweatpants with other apparel in  
12 a way that means you can't control that people are going to be  
13 able to closely count, one, two, three, oh, four; not adidas.  
14 So that's how these things are proximate.

15 Evidence of actual confusion. The Judge will tell you  
16 that the standard in a trademark case is not actual confusion.  
17 Adidas is not going to come up here and have to prove that  
18 absolutely a hundred percent confusion has already occurred.  
19 The test you will hear is likely, is it likely, what he said in  
20 the preliminary instruction. But there's actually been  
21 confusion in this case, and that is evidence that confusion is  
22 likely because it wouldn't have happened if it wasn't likely.

23 The first is you're going to see social media where  
24 people saw Thom Browne products being posted by Thom Browne and  
25 yet reacted thinking "adidas!!" or thought it was adidas when

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Opening - Mr. Henn

1 they encounter that red, white, blue stripe.

2 In addition, you're going to hear from an expert named  
3 Hal Poret. He did a survey of 2,400 consumers of sportswear.  
4 He showed them the Thom Browne products one at a time and  
5 showed them these images, and he asked, he said, "Who do you  
6 think puts this out?" And then he totaled up the numbers. And  
7 26.9 percent, 27 percent of consumers thought these were adidas  
8 products. That is evidence of actual confusion.

9 Bad faith. Well, I've previewed the bad faith a  
10 little bit by talking about Thom Browne's movement from  
11 tailored suits formal wear into sportswear. But it's not just  
12 that move. It's that move with full knowledge of adidas's  
13 rights. You will hear testimony from a couple of witnesses  
14 that back in 2007 Thom Browne was using three stripes on a  
15 business jacket on like a sport coat. And because it was three  
16 adidas said, "Hey, you can't do that. Even though it's a  
17 sports jacket, you can't do three." There was a call from  
18 adidas's inhouse lawyer to Thom Browne CEO, a man named Tom  
19 Becker, and they said, "You can't do that." Mr. Becker got  
20 from his lawyer a full printout of all adidas's trademark  
21 registrations for the three stripes, and the lawyers said they  
22 own registrations whether horizontal, vertical or diagonal. So  
23 they knew as of 2007 adidas owned this mark, adidas had this  
24 federally registered mark, and they had copies of all of the  
25 registrations.

1           They also should have known or knew that adidas was  
2 actively enforcing its Three-Stripe Mark rights across the  
3 country against companies that were coming out with two and  
4 four-stripe products. You'll hear from 2001 to today, adidas  
5 has filed a hundred lawsuits against companies using two and  
6 four stripes on product because of those confusion issues that  
7 we just talked about with the survey. When people see two and  
8 people see four, they think adidas even though numerically  
9 they're different. You'll hear about all of these companies.  
10 There is no way someone in the fashion and sportswear industry  
11 could not know that this was happening, that two and four  
12 stripes was an infringement of adidas's rights. And yet  
13 knowing those rights, knowing adidas's enforcement, Thom Browne  
14 went from suits to sweatpants to full on compression running  
15 apparel.

16           The compression apparel was released into the market  
17 two years after adidas objected to Thom Browne about their use  
18 of four stripes. That's bad faith. They knew what they were  
19 doing. With the Grosgrain, they used to use it as a little tag  
20 on the back of a jacket, but they used to use it inside the  
21 cuff here to protect the button row in the suit. Then they put  
22 it on shoes just like adidas, and then they went and ran it  
23 down sweatpants. Instead of sticking to what was okay and what  
24 was not infringement and not likely to cause confusion, they  
25 moved right into something that would be confusing.

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Opening - Mr. Henn

1           One of the factors you're supposed to consider is  
2           quality of parties' product. This isn't in dispute. Both  
3           parties have high-quality products they both spend a lot of  
4           efforts to make sure they put good products into the market.  
5           You will hear evidence about adidas selling some fairly  
6           high-end collaboration product where they're working with  
7           designers like Prada and Danielle Cathari or Gucci. It's not  
8           as though these are totally different levels of product.

9           And the last is this factor about how sophisticated  
10          are the consumers. What you're going to hear testimony about  
11          is that in the old days, there used to be sporting goods  
12          companies selling sporting goods, and there used to be fashion  
13          companies over here doing runway shows and doing fashion. And  
14          then over time, they started to move together. The sportswear  
15          companies started to do more leisure stuff. The fashion people  
16          wanted to get into sportswear, and they end up in the same  
17          place. And so consumers have become attuned to the notion  
18          that, well, there could be a collaboration between adidas and  
19          Thom Browne or between Prada and adidas.

20          And, as I mentioned, there's the data from the survey.  
21          So we know that no matter how sophisticated a consumer might  
22          be, when they were shown these four striped products, they were  
23          asked who put it out? They said, "adidas." Then they were  
24          asked an open-ended question. "Why?" Even though they were  
25          looking at four stripes, they said Three Stripes, Three



N13Qadi2

Opening - Mr. Henn

1 Stripes, Three Stripes, Three Stripes, Three Stripes, Three  
2 Stripes, Three Stripes. They were confused. Even though you  
3 might think of them as sophisticated. And, as I mentioned, it  
4 could well be that they just miscounted. It could well be the  
5 power of the adidas mark is such that you see four and think  
6 three, or it could be, frankly, that if you look at that, it  
7 looks like a white band with three navy blue stripes through  
8 it. But it doesn't matter. As you're listening to the  
9 evidence, you just need to decide whether confusion is likely,  
10 and we know from the survey that confusion is, regardless of  
11 what's causing it. So for all these reasons, confusion is  
12 likely.

13 Adidas also has a claim caution called dilution, which  
14 the Judge mentioned in the preliminary instruction. Dilution  
15 is a little different than infringement. It doesn't require a  
16 showing of likely to confusion. It requires us to show that we  
17 have a very well-known famous mark, which, as we discussed, the  
18 mark is extremely well-known. It also requires us to show that  
19 consumers associate these. So maybe they're not confused and  
20 think that a Thom Browne product comes from adidas, but when  
21 they see a Thom Browne product because of the stripes, because  
22 of the fame of the Three-Stripes Mark, they think of adidas.  
23 And you'll hear from a consumer psychologist marketing expert,  
24 who will explain how this happens in your brain. It's  
25 fascinating stuff. It talks about how there's an adidas drawer

N13Qadi2

Opening - Mr. Henn

1 in your head that you've encountered over the course of your  
2 life, and in there are things like the brand name and three  
3 stripes and authenticity, and maybe someone you dated once who  
4 wore the three stripes. All of that is in this little box in  
5 your head. And then when you see a Thom Browne product, it  
6 triggers an association. The drawer of adidas opens up and all  
7 this Thom Browne stuff comes in there. He'll explain in much  
8 better detail than I am, but that's the idea of how it affects  
9 the uniqueness of adidas's rights. Adidas has this drawer in  
10 your head that they want to be controlling what goes in there.  
11 And if someone else comes along and starts using stripes in a  
12 way that makes you think of adidas, it attaches into that  
13 drawer or to that memory. And once it's in that drawer, it  
14 ain't coming out, so it's a permanent effect.

15 We also know that that association happens because  
16 when people saw Thom Browne products on social media, adidas  
17 came to mind, and it doesn't necessarily -- we don't know  
18 whether this person was confused and thought it was an adidas  
19 product, but we know adidas came to their mind. We know that  
20 when they saw Thom Browne, their adidas drawer opened up  
21 because they said "adidas" when they saw it.

22 The survey itself is evidence of that association.  
23 Obviously you can't say adidas in response to a Thom Browne  
24 product if you haven't thought of adidas when you saw the Thom  
25 Browne product. So the evidence will line up perfectly to show

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1 that there has been dilution in this case.

2 What is adidas asking for? Two forms of monetary  
3 relief we're seeking in this case that is authorized. The  
4 first is damages. Damages is to compensate adidas for the harm  
5 that has incurred. And the other is profits, which is to say  
6 that it was unfair of Thom Browne to move into these  
7 compression running products, these sweatpants when it was  
8 clearly adidas's area and then profit from the use of the  
9 stripes. The parties have agreed that if you decide damages  
10 are appropriate, the amount is \$867,225. Because that is a  
11 licensing fee that adidas would have charged if Thom Browne  
12 bothered to ask for permission to take a license.

13 With regard to profits, you will hear testimony from  
14 an accountant who will explain that the total sales by Thom  
15 Browne of these products is about \$15.6 million. They had  
16 costs of about \$8.6 million, and so their unlawful profits on  
17 these products are just a hair over \$7 million. And that's  
18 what adidas is going to be asking you to award, those two  
19 amounts: \$867,000 and \$7 million.

20 Quickly, Thom Browne has a defense in the case where  
21 they say adidas delayed. Adidas should have sued us a long  
22 time ago. The key thing I want you to think about as you  
23 listen to this evidence is: Was adidas's failure to act  
24 between the spring of 2010 and May of 2012, that two-year  
25 period is the key period, was adidas's failure to act

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Opening - Mr. Henn

1 reasonable or unreasonable? You will hear that shortly before  
2 this, Thom Browne told adidas they were not going to infringe  
3 the mark, and adidas trusted them. Took them at their word.  
4 And therefore didn't stalk them to see if they were infringing  
5 the mark over the next few years. And why would they? They  
6 trusted them. And at the time during this period, they only  
7 had one store here in Tribeca. There were no filings publicly  
8 in the U.S. Trademark Office that would have triggered adidas  
9 for that four-stripe mark. They had very limited products  
10 during this period. I think they had a grey sweatpants -- a  
11 grey sweatshirt and maybe a pair of grey shorts. Tiny sales  
12 over that whole two-year period, the average sales were less  
13 than a thousand products a year nationwide. Imagine the  
14 haystack that adidas would have had to search through to find  
15 those needles. There was no advertising of this product. No  
16 actual confusion to adidas. And, meanwhile, as you saw from  
17 all those lawsuits, adidas was certainly enforcing its rights.  
18 So it acted reasonably and the evidence will show that.

19           The evidence will also show, as I previewed before,  
20 that Thom Browne moved in follow adidas's core zone of sports.  
21 That is called progressive encroachment, including launching  
22 the first ever-running category in 2020 after adidas objected,  
23 meaning that even if adidas had objected earlier, Thom Browne  
24 wouldn't have changed their behavior because we know how they  
25 acted after adidas objected. They launched a compression

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Opening - Mr. Maldonado

1 product after an issue was raised and then further expanded  
2 that athletic expression going forward.

3 What does that expansion look like here? That moved  
4 from formal to sweatpants right into compression. And thus you  
5 won't see an unreasonable delay, and you won't be able to find  
6 any harm to Thom Browne caused by that short period of delay  
7 because the evidence will show Thom Browne wouldn't have  
8 changed its behavior at all.

9 So in the end, the evidence will show that Thom Browne  
10 is liable for selling these particular products, and we will  
11 ask you to award the sum you see on the screen: A combination  
12 of damages and profits, approximately \$7.8 million.

13 Thank you.

14 THE COURT: Thank you very much.

15 And now we will hear from counsel for the defendant.

16 MR. MALDONADO: Thank you, your Honor. Good  
17 afternoon.

18 Ladies and gentlemen of the jury, you just heard  
19 adidas's version of its dispute. And as plaintiff, they get to  
20 go first. They'll always go first throughout this whole trial.  
21 But I encourage you to please to keep your minds open until  
22 you've heard all of the evidence.

23 Now you might be surprised that there are a number of  
24 things that Mr. Henn and I agree on. One is our appreciation  
25 of the time and effort that you're all putting in today as

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1 jurors in this case. We know it's a sacrifice, and we thank  
2 all of you for your time. And we also agree that adidas has  
3 valuable trademark marks rights in three vertical stripes,  
4 parallel stripes, that you might have seen on the side of a  
5 sweatshirt or pants. We agree that Thom Browne changed from  
6 three bars to four bars 15 years ago in response to adidas's  
7 demand that it stop using three stripes. Both sides agree on  
8 that. We agree that adidas did not complain or object when  
9 Thom Browne changed from three bars to four bars for over a  
10 decade, from 2008 through 2018, despite plenty of opportunity  
11 for adidas to see what Thom Browne was doing on a wide variety  
12 of clothing, including shorts and sweatpants. adidas said  
13 nothing.

14 Now, having heard adidas's opening, it will not  
15 surprise you that there are things we don't agree about. For  
16 example, Thom Browne does not agree that adidas's decade-long  
17 delay in objecting to the use of four bars was reasonable by  
18 any measure. Thom Browne does not agree that it shifted its  
19 business from formal wear to athletic sports clothing. Thom  
20 Browne does not agree that it wants to make gym clothes; it  
21 does not. Thom Browne does not agree that it seeks a profit  
22 from adidas's use of three stripes. And Thom Browne does not  
23 agree that consumers are confused or that adidas has been  
24 harmed in any way by anything that Thom Browne has done.

25 (Continued on next page)

1 MR. MALDONADO: Let me suggest to you, as you listen  
2 to the evidence, you will see that adidas' story, including its  
3 allegations and its excuses for not doing what it should have  
4 done that Mr. Henn just told you, does not line up with the  
5 facts.

6 Ladies and gentlemen of the jury, first allow me to  
7 introduce you to Mr. Thom Browne.

8 Please stand.

9 Thom Browne is a world-renowned fashion designer who  
10 epitomizes the American dream. Now few of you may have ever  
11 heard of him before today, but you'll learn about him through  
12 the course of this trial. Through Thom Browne's vision and  
13 creativity, he has changed the face of fashion across the  
14 world.

15 What he's wearing today from head to toe is clothing  
16 designed by him. You'll hear him tell his story. He started  
17 his company designing fashion that he wanted to wear because  
18 nobody else was doing it. He revolutionized the men's suit,  
19 and as you can see here on the screen, as witnesses will  
20 explain to you, he changed the proportions of men's suiting.  
21 He made the jackets shorter. He made the pant hems higher.

22 Thom Browne didn't wear his suit to trial today  
23 because of the trial. This is how he dresses every day. He  
24 and his employees dress like this every day. He created this  
25 look. It's his uniform, and it represents him and his company,

1 and he proudly wears this every day.

2 Now, Thom Browne's clothing is recognizable first by  
3 the way it looks, by his proportions and the look, as I just  
4 described to you, and some examples are here on your screen.  
5 But it is also identifiable because of two distinctive branding  
6 elements that Thom Browne uses throughout his clothing  
7 collection. One is the four parallel bars on the left sleeve  
8 or the left pant leg, which you see here on the screen on this  
9 jogging suit. Another branding element is the distinctive  
10 Grosgrain signature, which you've heard about. And this is a  
11 distinctive pattern of five colored stripes that you see --  
12 white, red, white, blue, and white -- and this is used at  
13 various locations on the garment. These are branding elements  
14 which tell you that this clothing is Thom Browne, and Thom  
15 Browne has used these branding elements for over a decade.  
16 It's not something new.

17 Now you've met me. I've introduced myself and my  
18 team. Also with us today is the chief financial officer for  
19 Thom Browne, Mr. Luigi Gajo.

20 So, ladies and gentlemen of the jury, nothing that  
21 Thom Browne has done in this case has anything to do with  
22 adidas. He's his own man. He creates his own design. He has  
23 his own vision, and his design set him apart from others. Thom  
24 Browne is always in the fashion news, regularly interviewed.  
25 He is an icon in the fashion world.



1           Mr. Thom Browne started designing clothes right here  
2 in New York City in his apartment. He poured all of his money  
3 into his business. He worked two other jobs to keep the  
4 business going. He nearly went broke, but it all paid off.  
5 And he is a classic American success story.

6           Now, if Thom Browne started his business by designing  
7 and selling a twist of the classic men's suit. And grew his  
8 business from there designing a full clothing section,  
9 embodying that Thom Browne look we just talked about, and he  
10 even expanded into women's, a women's collection, which  
11 embodied the same look, the same tailored look as you see in  
12 the images that we were just looking at. He applied the  
13 tailored look throughout his clothing collection, which have  
14 included from the beginning not only formal clothing, but also  
15 more casual clothing.

16           So whereas Mr. Henn tells you about the suits that he  
17 sold back in 2000, early 2000s, he also sold more casual  
18 clothing back then, including T-shirts, shorts, cardigan  
19 sweaters, and the like. He's been selling that since the mid  
20 2000s for over 15 years now.

21           Mr. Thom Browne added Jersey sweatpants to his  
22 collection in 2009. 14 years ago. He's been selling  
23 sweatpants for 14 years. It's not something new. His clothes  
24 are made of the best materials and the best craftsmanship.  
25 They are expensive and made to last. A Thom Browne suit costs

1 \$3500. Thom Browne sweatpants, top and bottom, costs \$1600.  
2 This is high-end luxury clothing.

3 Now, for some of his designs, Thom Browne drew  
4 inspiration from varsity sports sweaters, as you'll see here on  
5 the screen. These are various vintage images of varsity  
6 sweaters. Tom was an athlete in college and he wanted to  
7 project the sporting sensibility in his clothing design.  
8 Varsity sports sweaters, as you see here, often used parallel  
9 stripes on the sleeve. This is what Thom wanted to include in  
10 many of his clothing designs. He didn't design varsity  
11 sweaters. He designed cardigans and other items of clothing.  
12 And by the time he adopted these three bars that he is used on  
13 the sleeves, he had already been using the five-stripe  
14 Grosgrain signature that we talked about earlier. The use of  
15 both of these stripes designs cultivated a sporting sensibility  
16 or a sporting feeling that permeates his collection.

17 Now, when Thom Browne decided to use three bars and  
18 the Grosgrain, did he know about adidas? Yes, he did.  
19 Everybody knows about adidas. Was he inspired by adidas?  
20 Absolutely not. He's not a copier. He is an original  
21 designer. He doesn't follow trends. He designs what comes  
22 from his heart.

23 Thom Browne's clothing is unique. You will hear  
24 evidence that nobody is likely to confuse Thom Browne's luxury  
25 clothing with adidas' everyday athletic sportswear on a point

1 of sale when they are making a purchase. Thom Browne does not  
2 in any way, shape, or form compete with adidas.

3 Thom Browne is a luxury designer and adidas is a  
4 sportswear company that sells sneakers and clothing to play  
5 sports in. They operate on two different levels. Their  
6 clothes are different. Their marketing is different. Their  
7 price points are different. Yet here we are.

8 Ladies and gentlemen, this is a case about stripes;  
9 about adidas' three stripes. It's a case about bars; about  
10 Thom Browne's use of four bars. But whether you call them  
11 stripes or bars doesn't matter. As you listen to the evidence,  
12 you're going to hear witnesses talk about various fashion terms  
13 like sportswear, activewear, athleisure.

14 Don't be confused by the various terms that various  
15 witnesses use. Please focus on the facts. And the facts of  
16 this case are simple, but it's important that you don't get  
17 distracted by irrelevant facts. So let me preview to you the  
18 areas we'll address during this trial.

19 We will discuss trademark property lines. We'll talk  
20 about the use of stripes in fashion and in sports. We will  
21 talk about the fact that adidas and Thom Browne do not compete  
22 and the consumers are not confused. And we'll talk about  
23 fairness, including adidas' excessive and unreasonable delay in  
24 not taking any action against Thom Browne for more than  
25 ten years after adidas made Thom Browne stop using three bars.

1           So let's talk first about trademark property lines.  
2       This is a trademark case. You'll hear evidence about  
3       trademarks, registrations owned by adidas. You can think of  
4       trademarks as parcels of property. And as you see here on the  
5       screen, you have a parcel of property, let's say adidas'  
6       Three-Stripe Marks, the vertical three stripe marks. That's a  
7       trademark owned by adidas. And there may be neighbors around  
8       you that may own different stripes on different properties.

9           Now, adidas claims it owns trademarks of three stripes  
10      as used on apparel and footwear. And if you look here, these  
11      are some of the registrations they are asserting in this case.  
12      These are trademark registrations that adidas owns for apparel,  
13      and you will see each of them is three stripes. Three stripes  
14      on the sleeve. They are all three vertical stripes. Always  
15      the number is three. You will not see a trademark registration  
16      for any number of stripes other than three.

17           Now, on the next page shows various trademark  
18      registrations owned by adidas for apparel and footwear. Again,  
19      always three stripes.

20           Finally, on this page you'll see various registrations  
21      that adidas is asserting in this case for three stripes on  
22      headgear. Again, it's always three stripes.

23           Just so you know, by the way, in this case, you'll  
24      learn, as you see the evidence, adidas is not accusing any Thom  
25      Browne headwear of infringement.

1           Now, while adidas claims rights to three stripes, it's  
2 constantly trying to extend those rights to protect other  
3 numbers of stripes on clothing. But simply stated, adidas does  
4 not own all stripes on clothing. Regardless of the number of  
5 stripes, many other designers use stripes on clothing. You'll  
6 see evidence of that as we go through the trial.

7           Now, adidas' use of stripes as seen in these  
8 registrations has almost always been vertical, up and down.  
9 This is what adidas is most known for. Adidas does not own any  
10 registration for horizontal stripes on clothing, on tops, on  
11 shirts, on jackets, on pants. You're not going to see any  
12 horizontal stripe registrations owned by adidas.

13           Thom Browne, on the other hand, uses horizontal  
14 stripes or bars. This bearing repeating. This is important  
15 for you to keep in mind. Thom Browne uses horizontal stripes  
16 and bars.

17           Now, adidas is also known for its Trefoil and Badge of  
18 Sport Mr. Henn put on the screen earlier. You might recognize  
19 these. These are pretty well-known as corresponding to adidas.  
20 But in this case, adidas is not asserting either of those  
21 registrations against Thom Browne.

22           Now, you'll hear testimony from a Ms. Joanne Arbuckle,  
23 an educator at the Fashion Institute of Technology here in New  
24 York City. She's got over 30 years of experience in fashion  
25 design. She knows all about fashion history, and she'll

1 explain to you the historical use of stripes in the fashion  
2 industry and how stripes have long been associated with sports.  
3 Many people have used stripes. If you watch football on TV,  
4 you look at the player's uniforms, you're going to see stripes.

5 The use of stripes in connection with sports goes back  
6 centuries. It's not owned by adidas. Stripes have also been  
7 long associated with military uniforms, with pilot's uniforms.  
8 You may see the stripes on the sleeves of pilot uniforms.  
9 Ms. Arbuckle will explain to you how these ancient uniform  
10 designs made their way into modern clothing, the clothing that  
11 you wear today. Look in your closets, you'll see you have  
12 stripes on your clothing.

13 Now, any property rights that adidas may have in three  
14 parallel stripes does not extend to other stripes. Adidas does  
15 not own two stripes, four stripes, or five stripes or any  
16 number of stripes. Ms. Arbuckle will show you examples of how  
17 others in the fashion industry have used other numbers of  
18 parallel stripes. So keep in mind that adidas' rights in  
19 stripes are limited.

20 Now let's talk about adidas' knowledge of Thom Browne.  
21 Now, Thom Browne is one of the many companies who used stripes  
22 or bars on its clothing, but one of things that makes Thom  
23 Browne different and stand out from the rest is that adidas has  
24 known about Thom Browne using stripes on his clothing since  
25 2006. 2006, adidas has known this for over 16 years now.

1           And so, ladies and gentlemen, this is a case about  
2 fairness. Thom Browne first used three bars of his clothing in  
3 2005. If you look here on the screen, you'll see an example of  
4 three bars on a cardigan sweater from 2006. When adidas  
5 learned that Thom Browne was using three bars, it demanded that  
6 Thom Browne stop. That was in 2007.

7           Thom Browne did not want to get into an expensive  
8 fight with a global behemoth like adidas, so he stopped using  
9 three bars and changed to four bars. Adidas never complained  
10 about the switch from three bars to four bars. Never  
11 complained for over a decade. For over ten years. And the  
12 evidence will show you that adidas delayed and waited for more  
13 than ten years, and this was unreasonable. After Thom Browne  
14 achieved success and he established a reputation in the use of  
15 these four bars on his clothing, now adidas wants him to stop,  
16 and that's not fair.

17           Now, you'll hear evidence of the harm that Thom Browne  
18 would suffer if it was caused to stop using its two signature  
19 branding elements. It would not only be unfair to Thom Browne,  
20 but it would be unfairly reward adidas, extending its property  
21 rights, and forgiving adidas basically for falling asleep at  
22 the wheel through the detriment of Thom Browne.

23           Now, we think that a timeline would be helpful for  
24 understanding the facts here. In 2001, Thom Browne started his  
25 business here in New York City. From the beginning, he used a

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1 Grosgrain signature on his clothing, and it's always been a  
2 pattern of white, red, white, blue, and white.

3 In 2005, he began using horizontal bars on the left  
4 sleeve of his shirt or jacket or on a pant leg. In 2006, Thom  
5 Browne opened his first store here in New York City in TriBeCa.  
6 First and only store here in New York.

7 At the time that he opened the store, a fashion  
8 publication called DNR published an article about the opening  
9 of the store. In that article, as you'll see on screen, a  
10 picture of a sport coat with three bars on the left sleeve.  
11 Now this article was brought to adidas' attention in 2006.  
12 Adidas investigated Thom Browne, and in 2007, adidas' in-house  
13 counsel at the time -- a woman by the name of Vanessa  
14 Backman -- called Thom Browne's CEO at the time -- a man by the  
15 name of Tom Becker -- and told him that Thom Browne needed to  
16 stop using the three bars because adidas believed that Thom  
17 Browne was infringing its rights using three bars on a sports  
18 coat.

19 Now, Thom Browne did not agree that it was infringing,  
20 but Thom Browne was a small company at the time. It was having  
21 financial difficulties, it was struggling to stay afloat, and  
22 it could not afford to go into a battle with the mammoth German  
23 powerhouse that is adidas. So Thom Browne decided to stop  
24 using three bars so it could move forward with his business.  
25 But he wanted to stay with the idea of using bars on the left



1 sleeve because he wanted to maintain that collegiate reference.  
2 He played around with with different numbers of stripes, and  
3 eventually he came up with four bars as his new signature, and  
4 that was debuted in 2008.

5 In 2009 he debuted, the following year, he debuted  
6 jersey sweatpants having hour bars. For the next decade,  
7 silence from adidas. He decided to make the change in 2007,  
8 15 years ago. That was the same year that Apple first  
9 introduced the iPhone. Now we're up to iPhone 14. That shows  
10 you how much time has passed.

11 Thom Browne voluntarily changed his branding from  
12 three bars to four bars, and he did this to appease adidas.  
13 What did adidas do? Adidas stayed silent and said nothing.  
14 And during this time that adidas was silent, Thom Browne grew  
15 his business. He went from one store in the U.S. to six stores  
16 in the U.S. and two in Canada. He went from having his  
17 products sold through 100 department stores in the U.S. to  
18 400 department stores in the U.S. He expanded his collection  
19 from a men's collection to a women's collection. He expanded  
20 his outerwear collection. He added children's collection. He  
21 grew his business using his signature brand elements throughout  
22 each of these lines, understanding that there was no objection  
23 from adidas because adidas said nothing and didn't complain.

24 Now, adidas must have known what Thom Browne was doing  
25 before 2018. And, ladies and gentlemen, as you listen to the

1 evidence, you'll decide for yourself. But the evidence will  
2 show that adidas certainly should have known what Thom Browne  
3 was doing. In 2008, Thom Browne first displayed his four-bar  
4 signature on his runway show held right here in New York City.  
5 That's on the screen in front of you, the sweater.

6 Yet adidas' witnesses will testify they didn't know  
7 what Thom Browne was doing. But the evidence will show to the  
8 contrary, that adidas could have very easily found out what  
9 Thom Browne was doing if it had only tried. And why do we say  
10 that? Because adidas is aggressive in policing and enforcing  
11 its Three-Stripe Mark. It aggressively pursues strangers and  
12 counterfeiters. Adidas knows what it's doing.

13 It's in the fashion business and attends fashion  
14 shows, as Thom Browne does. Adidas monitors fashion magazines  
15 to see what others are doing in fashion. That's how they found  
16 out about Thom Browne in the first place. Adidas' witnesses  
17 admit that after they found out about Thom Browne in 2007, Thom  
18 Browne was on its radar.

19 Now, in 2008 Thom Browne had only one store. One  
20 store in New York City. Now how easy would it have been for  
21 adidas to go visit that store to see what Thom Browne was  
22 doing. It could not have been any simpler. You'll hear  
23 adidas' witnesses say that Thom Browne did limited marketing.  
24 But Thom Browne is a high-end luxury brand. High-end luxury  
25 brands often do not spend a lot of money on advertising,

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1 traditional advertising. People still know about them and know  
2 what they are doing. How do they know? They know through  
3 runway shows, they know through fashion magazines, they know  
4 through social media, celebrities, high-profile celebrities  
5 wear the luxury brands. People see it and know about the  
6 brands.

7 Now, Thom Browne's runway shows are attention-  
8 grabbing, often reported in the fashion media from 2008 through  
9 2012. During that four-year period, Thom Browne had at least  
10 ten fashion shows in New York and Paris. His shows are  
11 attended by fashionistas, by fashion industry reporters, by  
12 celebrities, by buyers for department stores throughout the  
13 U.S., like Saks Fifth Avenue and Nordstrom.

14 Thom Browne was not hiding. He was out there. He was  
15 public. His clothing was public. Celebrities are wearing his  
16 clothing. Here, you'll see LeBron James. He dressed Michelle  
17 Obama for the 2013 inauguration. You see Kevin Hart here  
18 wearing Thom Browne. He was out there. His brand was out  
19 there. His four bars were out there. It could have been very  
20 easy for adidas to know what Thom Browne was doing.

21 Adidas' lawyer had Thom Browne's phone number. She  
22 called him in 2007. They could have called him at any time  
23 between 2007 to 2018. No phone calls. Zero. They could have  
24 e-mailed him. They could have done anything, but adidas chose  
25 to do nothing.

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Opening - Mr. Maldonado

1           Now, Thom Browne's sweatpants, as Mr. Henn admitted,  
2           are sold in many of the same department stores that you see on  
3           the screen here -- Barney's, Bergdorf, Neiman Marcus,  
4           Nordstrom, Saks Fifth Avenue, and Thom Browne's own store here  
5           in New York. Any one of these stores adidas could have visited  
6           and would have seen Thom Browne's clothes, would have seen Thom  
7           Browne's sweatpants with four bars that were being sold since  
8           2009. Adidas chose not to complain.

9           Now, you will hear evidence that adidas waited so long  
10          because it didn't know what Thom Browne was doing. They didn't  
11          know Thom Browne was selling activewear. But Thom Browne's  
12          clothing, as I have mentioned, as the evidence will show, was  
13          never limited to just suits. He always sold other items, and  
14          he sold a full collection of clothes. That is how luxury  
15          brands work. They try to dress their customer in whatever they  
16          want to wear. They try to have a wide range of clothing,  
17          formal and casual. That includes what Thom Browne did, and  
18          he's been selling all these items for quite a long time.  
19          Mr. Henn made it sound like this was all new and all recent.  
20          He was only selling suits until recently. It's not true. You  
21          will see the evidence does not support that.

22          Now, as far as sports and adidas kind of thinking that  
23          they own stripes in the sporting world, Mr. Thom Browne's  
24          collections have always had a sports-inspired theme. And if  
25          you look at a slide here of his runway shows, his very first

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1 fashion show in 2006 was an ice-skating theme show. He's also  
2 had other shows. Here they are. We have a tennis collection  
3 show in 2008. We have a swimwear collection show. And he's  
4 had a football capsule. So he's always had -- sporting has  
5 always been part of the equation for him.

6 Now, as I mentioned, the parties are not in  
7 competition and there is no confusion. You will not hear any  
8 evidence that any consumer was confused when shopping in a  
9 store or online for Thom Browne's or adidas' goods. You won't  
10 hear any evidence of that. And Mr. Henn talked about how  
11 adidas is not going to look at point of sale confusion, which  
12 is convenient, because there is no point of sale confusion.  
13 You're not going to hear any evidence that anyone is confused  
14 when they walk into a store. No one is going to purchase a  
15 Thom Browne \$800 pair of sweatpants thinking they are buying  
16 adidas. That isn't going to happen. It hasn't happened.

17 Now, as I mentioned, Thom Browne began selling  
18 sweatpants since at least the fall of 2009. 14 years ago. And  
19 throughout that time, there's been no confusion. Why has there  
20 been no confusion? First, because adidas' three vertical  
21 stripes and Thom Browne's horizontal bars are not similar. If  
22 you look at them side by side, they are not similar. They are  
23 very distinct. They are very different and convey different  
24 things. Three stripes is not the same as four horizontal bars,  
25 and only on one side. Adidas is using stripes on both sides.

1           Second, the parties operate in different markets.  
2           Luxury versus sportswear. And while adidas will point to  
3           collaborations with other brands like Gucci, in those  
4           collaborations, Gucci transforms the adidas Trefoil into a  
5           Gucci Trefoil, as you'll see here. Now you have adidas, what  
6           was previously the adidas Trefoil, now it says Gucci. Now that  
7           is associated with Gucci. These are high-end luxury clothes  
8           now associated with Gucci. They are not adidas clothes.

9           So the parties operate in different markets.  
10          Sometimes it's sold in the same department stores, as you've  
11          heard, not sold side by side. The luxury brands have their own  
12          section, and Thom Browne is going to be with Christian Dior,  
13          Louis Vuitton, Chanel. He is not going to be with adidas.  
14          Adidas is going to within the sportswear company, with Nike and  
15          Puma, and they will be in different places.

16          We talked about different price points. Pair of  
17          sweatpants here, you'll see adidas sweatpants \$55. Thom Browne  
18          sweatpants \$1,000. And if you look at the sweatpants -- you'll  
19          have a chance to do this during trial -- you'll see the  
20          difference in quality. You'll see the difference in design.  
21          Thom Browne's sweatpants are often seen and worn, as you'll see  
22          in this picture, with a dress shirt, with a tie. It's not  
23          sweatpants for the gym. It's not sweatpants to go out running.  
24          These are high-quality fashion items. They are not competitive  
25          with adidas.

1           Now, you heard Mr. Henn talk about dilution, and  
2       adidas claims its brand is being diluted, which means its  
3       three stripes being somehow watered down by what Thom Browne is  
4       doing. This is not true. Adidas' experts will testify to you  
5       about brain nodules and theoretical possibilities of harm. But  
6       you're not going to hear any concrete evidence of any actual  
7       harm to the adidas brand. You're not going to hear any of that  
8       because Thom Browne has not done anything to harm the adidas  
9       brand. On the other hand, you might or you will hear evidence  
10      that adidas itself has weakened its own brand by allowing Gucci  
11      and others to cannibalize its Trefoil. And its own expert has  
12      admitted that that has harmed the brand.

13           So, ladies and gentlemen, keep an eye on the evidence  
14      to see if these six fundamental facts are, as I have suggested:

15           One is that adidas' rights in the Three-Stripe Mark  
16      are limited;

17           Two is that Thom Browne's use of four bars  
18      horizontally is not similar to adidas' use of three stripes  
19      vertically;

20           Three, there is no evidence that consumers are  
21      confused when they are making a purchase; they are not going to  
22      purchase one product thinking its the other;

23           Four, the parties are worlds apart and they don't  
24      compete;

25           Five is that adidas knew or should have known what

1 Thom Browne was doing in 2008, and by no later than 2012,  
2 within those few years, contraband should have known what Thom  
3 Browne was doing and it could easily have found out what Thom  
4 Browne was doing; and

5 Six, that adidas chose not to act, adidas fell asleep  
6 at the wheel and woke up too late, and that's what's happened  
7 here.

8 So we ask you to keep your mind open until after  
9 you've heard all of the evidence. And if you follow the  
10 evidence and you apply the law, as instructed by the court, at  
11 the end of the day adidas should not be allowed to claim more  
12 than they own, they should not be allowed to claim more from  
13 Thom Browne than what he promised them, and they should not be  
14 rewarded for falling asleep at the wheel and allowing Thom  
15 Browne to grow his business and reputation, thinking that  
16 adidas had no objection to what he was doing. Adidas chose  
17 silence. They never said anything.

18 So we thank you, ladies and gentlemen, for taking your  
19 time from your busy lives and engaging in this effort to reach  
20 your verdict based on the facts and the law. We will do our  
21 best to use our time to present a credible, understandable, and  
22 relevant and interesting case to you. We thank you for the  
23 seriousness of purpose that you bring to your roles as jurors.

24 Thank you.

25 THE COURT: Thank you very much.



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1 All right. Plaintiff will call their first witness.

2 MR. HENN: Your Honor, we call Chris Murphy.

3 Your Honor, we have notebooks, hard copies of the  
4 exhibits. If your Honor wants them, we can bring them forward  
5 or wait to see if they are needed.

6 What would you prefer?

7 THE COURT: I'll take one. I never refuse a free  
8 deal. Just give them to my law clerk.

9 THE DEPUTY CLERK: Is Christopher Murphy in the  
10 courtroom now?

11 Please take the witness stand.

12 CHRISTOPHER GORDON MURPHY,

13 called as a witness by the Plaintiffs,

14 having been duly sworn, testified as follows:

15 Please be seated and state your name and spell it for  
16 the record.

17 THE WITNESS: Christopher Gordon Murphy, M-u-r-p-h-y.

18 THE COURT: Counsel.

19 DIRECT EXAMINATION

20 BY MR. HENN:

21 Q. Good morning, Mr. Murphy.

22 Would you just take a moment and introduce yourself to  
23 the jury, please?

24 A. Sure. Good morning. Hi. I'm Chris Murphy. I'm the  
25 senior vice president of brand marketing for adidas North

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Murphy - Direct

1 America.

2 Q. Where you live, tell us a little about your family and  
3 educational background?

4 A. Sure. I live in Portland, Oregon. I grew up in Seattle,  
5 Washington. I have a wife, two little girls, two dogs, two pet  
6 rats, and a bearded dragon. We call them pets.

7 I went to undergraduate at Willamette University in  
8 Salem, Oregon. Master of business administration from the  
9 University of Oregon and Eugene and have a digital certificate,  
10 master's certificate, from Arizona State in digital marketing.

11 Q. How often have you been at adidas?

12 A. I've been there just under 17 years.

13 Q. Will you walk the jury through the positions you've held  
14 since you got there?

15 A. Sure. I started in 2006 working in basketball overseeing  
16 digital marketing for China and the U.S. I then went on to  
17 oversee the digital marketing team which was focused just on  
18 the U.S. at that time. I then proceeded to oversee the brand  
19 marketing organization on the sports side.

20 So we have two divisions, sport and style. I oversaw  
21 sport. I then went on to oversee a team called the news room  
22 focused on PR and social media. I then went on to be the vice  
23 president of digital marketing and media, and now I'm currently  
24 the senior vice president of brand marketing.

25 Q. What does the phrase brand marketing mean in the context of

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Murphy - Direct

1 your job?

2 A. Sure. My job and my team's job is to create desire and  
3 interest in the brand, the three stripes, and ultimately to  
4 drive people to consider and purchase our products.

5 Q. What are your duties as the senior vice president?

6 A. So I oversee teams that are focused on things like  
7 developing content and creative. So the TV commercials you  
8 might see from our brand. We buy the media for those TV  
9 commercials.

10 We work across all digital marketing platforms, what  
11 you might see on social media, what you might see on *espn.com*.  
12 We do a lot with public relations, so PR articles you might  
13 read around adidas.

14 We do a lot of purpose marketing, so it is very  
15 important for us we are thought of as a sustainable and  
16 inclusive brand. So we are very much involved in the purpose  
17 side of things.

18 And then last, but not least, we do a lot of work with  
19 athletes and influencers to make sure they're wearing our  
20 products on the field, on the pinch, on the court.

21 Q. We're going to spend a lot of time with you on your  
22 marketing activity.

23 Since you're the first witness, take a moment and  
24 explain to the jury how adidas is structured in terms of both  
25 global and U.S. and product category breakdown?

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1 A. So I work for the North America organization, which is the  
2 local subsidiary of a larger global organization which is based  
3 in Germany. We are organized in kind of three different ways.  
4 We have a sales organization, we have a product organization,  
5 and then we have a marketing organization. I'm part of the  
6 marketing organization.

7 Within all those, we are organized by category.  
8 Categories are things like soccer, basketball, running  
9 categories. And then we have a lifestyle category, categories  
10 more focused on street and style.

11 Q. What are the major design marks that adidas uses in its  
12 marketing?

13 A. We have the main design mark is the Three-Stripe Mark.  
14 We're known as the brand with three stripes.

15 Q. Let's pull up Exhibit 1.

16 Just identify that for the jury.

17 A. Sure. This should be a well-known shoe. This is our  
18 superstar popular, famous shoe. You'll note the three stripes  
19 running down the side of the shoe with the superstar name next  
20 to the top stripe.

21 Q. How long has adidas used the --

22 THE COURT: I'm sorry. Are you offering this?

23 MR. HENN: I'm sorry, your Honor?

24 THE COURT: Are you offering this exhibit?

25 MR. HENN: Yes. We offer Exhibit 1.

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1 THE COURT: All right. Any objection?

2 MR. CONLEY: No objection.

3 THE COURT: Received.

4 (Plaintiff's Exhibit 1 received in evidence)

5 BY MR. HENN:

6 Q. How long has adidas used the Three-Stripe Mark on footwear?

7 A. On footwear? In Europe in the '40s and in the U.S. in the  
8 '50s, since the '50s.

9 Q. Let's pull up Exhibit 2.

10 Would you identify Plaintiff's Exhibit 2 for us?

11 A. Sure. This is a pant you also know too. This is a Tiro  
12 pant, very popular. You can see the stripes running down the  
13 sleeve of the jacket being worn and down the pants. Also note  
14 the three stripes on the shoe and three stripes as part of the  
15 logo on the pants as well.

16 MR. HENN: Your Honor, we offer Exhibit 2.

17 MR. CONLEY: No objection.

18 THE COURT: Received.

19 (Plaintiff's Exhibit 2 received in evidence)

20 Q. How long has adidas used the Three-Stripe Mark on apparel?

21 A. Late '60s, early '70s.

22 Q. Does adidas maintain a collection of its catalogs dating  
23 back to that time period?

24 A. Yes, we do.

25 Q. I'm going to go through a series of exhibits for you by

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1 decade to try and speed things along.

2 Let's pull up Exhibit 3 first.

3 Would you just tell the jury what is contained in the  
4 compilation that is Exhibit 3?

5 A. Sure. A collection of catalogs starting back in the '70s  
6 and running through each decade showcasing our product  
7 footwear, apparel, accessories, yes.

8 MR. HENN: Your Honor, we offer Exhibit 3.

9 MR. CONLEY: There is an objection, your Honor.

10 THE COURT: Ground.

11 MR. CONLEY: Foundation.

12 THE COURT: How do you know what this is?

13 THE WITNESS: How do I know what this is?

14 THE COURT: Yes.

15 THE WITNESS: We have lots of product catalogs. We  
16 see them every season.

17 THE COURT: Did you collect the ones that are shown  
18 here?

19 THE WITNESS: No, but I have seen them previously.

20 THE COURT: You saw them at work?

21 THE WITNESS: I see catalogs all the time, yes.

22 THE COURT: Do you want to lay any further foundation?

23 MR. HENN: Happy to, your Honor.

24 BY MR. HENN:

25 Q. Mr. Murphy, have you reviewed the catalogs from the 1970s

1 that are contained in Exhibit 3?

2 A. Yes, I have.

3 Q. Have you looked through the entirety of Exhibit 3 and  
4 confirmed those are, in fact, catalogs from the 1970s?

5 A. Yes, I have.

6 MR. HENN: Your Honor, we offer Exhibit 3.

7 THE COURT: Received.

8 (Plaintiff's Exhibit 3 received in evidence)

9 Q. We're not going to go through the whole exhibit, not to  
10 bore anyone. Let's look at a few pages.

11 What I would like you to do, Mr. Murphy, is identify  
12 the product and how the Three-Stripe Mark is being used on the  
13 page. So if we go to page four.

14 A. Sure. You can see the three stripes on the footwear, you  
15 have some soccer completes as well as some basketball shoes in  
16 this one. You see the three stripes running down the side of  
17 the shoes. You'll also see a track suit in the background.  
18 You can see the three stripes running down the length of the  
19 sleeve as well as the pants as well you can see the three  
20 stripes running down the side of the pants.

21 Q. If we go over to page 29.

22 Would you identify that shoe for us?

23 A. Sure. This is the Americano, popular basketball shoe from  
24 the '70s. You see the three stripes running down the side of  
25 the shoe in blue, red, blue combination. You can also see

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1 three stripes on footwear in the background as well.

2 Q. Go to page 57.

3 What do we have here?

4 A. These are some of the early track suits, the Beckenbauer  
5 track suit. You can see the stripes on the track suits running  
6 down the length of the arm as well as down the side of the pant  
7 leg. You can also see three stripes on the footwear being worn  
8 as well.

9 Q. Go over to page 61, please.

10 What are these products and how is the Three-Stripe  
11 Mark used?

12 A. This is from the soccer page of the catalog. You can see  
13 on the tops. You'll see three stripes running down the side of  
14 the arm. You can see on the shorts, three stripes running down  
15 the side of the shorts. On the top of the sock, you'll also  
16 see three stripes. And then on the cleats and then on the  
17 non-cleated footwear, you'll see three stripes running on both  
18 the inside and the outside of the shoes.

19 Q. Go over to page 85.

20 Can you identify what that page is?

21 A. Sure. This is from our catalog from 1979.

22 Q. If we go over to page within this, the next page 86, just  
23 identify the product and the way in which the Three-Stripe Mark  
24 is being used?

25 A. Sure. These are more soccer products. You can see the



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1 three stripes running down on the upper right, length of the  
2 sleeve. You can see three stripes on the shorts in the upper  
3 right picture as well, and then two to the left. You'll see  
4 the three stripes running down the length of the short as well.  
5 You'll also note that in the logo there, the Trefoil logo,  
6 three stripes within the Trefoil logo as well.

7 Q. Last, let's go to page 89.

8 Would you identify the products on this page and the  
9 use of the Three-Stripe Mark?

10 A. Sure. You'll note on the left-hand side of the middle,  
11 three stripes running down the sleeve, stopping short of the  
12 cuff. You'll also notice lower left, three stripe running  
13 horizontally across the side of the sleeve.

14 Q. Take that down. Thank you.

15 We'll next pull up Exhibit 4. Go ahead and ask you  
16 some foundational questions to speed the process here.

17 Mr. Murphy, have you reviewed the catalogs contained  
18 in Exhibit 4?

19 A. Yes, I have.

20 Q. And what is contained in Exhibit 4?

21 A. Collection of products from our catalog from the 1980s.

22 MR. HENN: Your Honor, we would offer Exhibit 4.

23 MR. CONLEY: Same objection, your Honor.

24 If we could briefly be heard at sidebar?

25 THE COURT: Well, I'm really wondering whether a

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1 sidebar is necessary, but OK.

2 (Continued on next page)

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1 (At the side bar)

2 MR. CONLEY: My main concern, your Honor, is that  
3 he's being treated like a 30(b)(6) witness. He has previously  
4 testified catalogs are not marketing. They are not  
5 advertising. That's not his bailiwick. He does not review  
6 catalogs. Now he seems to know all about these various  
7 catalogs from various decades.

8 THE COURT: No, no, no. I don't understand that  
9 objection.

10 First of all, there is no such thing at trial as a  
11 30(b)(6) witness. That's a question of deposition.

12 Second of all, if you're saying that he previously  
13 said he wasn't familiar with these catalogs. The point is he's  
14 reviewed them. He reviewed them in preparation for this trial.  
15 He could have reviewed them last night.

16 I guess I don't see any reason to question --  
17 and I take it you're not questioning that these are,  
18 in fact, catalogs of adidas?

19 MR. CONLEY: No.

20 MR. HENN: They stipulated to authenticity, your  
21 Honor.

22 THE COURT: All right. So thank you for the sidebar.  
23 However, since we're at the sidebar, if you're  
24 offering an exhibit not yet in evidence, it should first be put  
25 up on the screen of the witness and the lawyers and then ask

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1       them to identify it. And then if I receive it, you then show  
2       it to the jurors not before.

3               MR. HENN: Fair. I wondered if -- maybe we can take  
4       this up during a break. We exchanged exhibits the night before  
5       and worked through, I thought --

6               THE COURT: Well, if you want to jointly offer a whole  
7       bunch of exhibits and put that on the record during a break, I  
8       will certainly speed things along. I'm happy to do that. That  
9       hasn't been done since yet.

10              MR. HENN: Fair. OK.

11              THE COURT: So go back, but I'm going to explain to  
12       the jury what sidebar is are.

13              MR. HENN: Thank you, your Honor.

14              (Continued on next page)

1 (In open court)

2 THE COURT: Ladies and gentlemen, let me just explain  
3 two things so you'll understand the procedure.

4 First, when testimony or an exhibit is offered, the  
5 other side has a right to object on the grounds that it doesn't  
6 comply with the Federal Rules of Evidence.

7 Now, what are the Federal Rules of Evidence?  
8 Fortunately, you don't need to know. Not even one little bit.  
9 But I need to know, and they actually come -- if you're  
10 curious, they come down to us from about 500 years ago, even  
11 before there was a United States, and they determine that  
12 certain types of evidence are admissible and certain types are  
13 not.

14 So don't hold it against any lawyer if he or she says  
15 objection. That's their job to say, Judge, we don't think it  
16 complies with the rule of evidence, and then I'll determine  
17 whether it does or not. The only thing that will be evidence  
18 what is received for you.

19 So, for example, if a question is put, Isn't the moon  
20 made of green cheese? And there is an objection presumably by  
21 lovers of other forms of cheese, and there is an objection and  
22 I say sustained, then you must disregard the question.

23 Now, every once in a while an objection is made that  
24 requires me to know more than can be expressed in front of you.  
25 For example, I may need to know what the next five questions

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1 are to see whether the evidence is relevant or not. So then we  
2 have a sidebar so that you don't hear what is going on. It's a  
3 great opportunity for you to twiddle your thumbs or yawn or do  
4 whatever else you like. We will try to keep these sidebars to  
5 an absolute minimum, but occasionally they have to occur.

6 So, again, this is standard trial practice. Don't  
7 street it as anything abnormal. It's nothing to do with you,  
8 it's just to do with me and determining the rules of evidence,  
9 and ultimately it is about you for this reason. The common  
10 denominator of the rules of evidence is that the evidence  
11 presented to you must be at least minimally trustworthy before  
12 you can hear it.

13 So I'll give you a common example: Hearsay. If  
14 someone testified in a murder case, I heard Smith say to Jones  
15 that he saw John kill Mary, that would be zero evidence. You  
16 should never even hear that. And if it was posed in a question  
17 that were given in testimony, I would sustain the objection and  
18 tell you to disregard it because it's not the testimony of  
19 someone who actually saw the murder. It's not the testimony of  
20 someone who was even told about someone who saw the murder.  
21 It's light years removed. It's not evidence at all. It's just  
22 gossip, and we don't allow gossip. So that's what this is all  
23 about. But don't you worry about it, I'll take care of it.  
24 That's what objections and sidebars are.

25 OK, counsel. Go ahead.

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1 MR. HENN: I believe I was offering Exhibit 4. I'm  
2 not sure you accepted it.

3 THE COURT: Yes. There was the same objection.  
4 Received.

5 MR. HENN: Thank you.

6 (Plaintiff's Exhibit 4 received in evidence)

7 BY MR. HENN:

8 Q. You can publish that now, Exhibit 4.

9 Same exercise, Mr. Murphy, with the catalogs from the  
10 1980s. Starting on the cover here from the 1980 catalog, can  
11 you identify where the Three-Stripe Mark is being used?

12 A. Sure. No problem.

13 You can see the three stripes running town the sleeve  
14 on the soccer jersey. You can see the three stripes running  
15 down the side of the shorts. There are three stripes at the  
16 top of the socks, and you can see the three stripes on the  
17 inside of the right leg of the soccer player.

18 Q. Go over to page five. Same question, identify the product  
19 and tell us how the Three-Stripe Mark is being used.

20 A. Sure. These are track jackets. You can see the three  
21 stripes, slightly wider than we've seen in previous examples,  
22 running down the length of the sleeve. You also note the three  
23 stripes in the logo, on the large logo on the left side of the  
24 chest. And if you look down at the shoes, you'll see three  
25 stripes on the footwear as well.

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1 Q. Go to page 13. How is the Three-Stripe Mark used here?

2 A. Sure. These are basketball shoes from the '80s. You can  
3 see the three stripes running down the side of the outside of  
4 all one, two, three, four, five pairs of basketball shoes, and  
5 also see three stripes in the logo on the tongue on a number of  
6 the shoes.

7 Q. Over to page 56. Identify this for us and how the  
8 Three-Stripe Mark is used.

9 A. Sure. This a catalog from 1984. You can see three stripes  
10 being used on the T-shirt running horizontally across the  
11 chest. You can also see it wrapping around both sleeves. It's  
12 also in the logo in the center of the chest.

13 Q. If we go over to page 89. What do we have here?

14 A. These are kids shoes from the catalog. You can see three  
15 stripes running down the outside of all of the shoes showcased.  
16 You can see the use of different colors of the three stripes,  
17 including the left where you have white, red, white. And you  
18 will also note the three stripes running across the logo used  
19 on the tongue of all shoes.

20 Q. I notice that the language on page 89 is in German.

21 Does that mean that these were only sold in Germany  
22 during that time?

23 A. No. As we mentioned before, we are the local subsidiary of  
24 a larger organization based in Germany, and often look at  
25 catalogs from Germany.



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1 Q. Page 155. What do we have here and how is the Three-Stripe  
2 Mark used?

3 A. This is a catalog from 1986. You can see on the football  
4 jersey above the 77, you'll see the three stripes being  
5 utilized in the logo. On the left sleeve, also see three  
6 stripes on the blue, red, blue pattern wrapping around the  
7 sleeve, and see three stripes in the logo on the left sleeve  
8 as well.

9 Q. Go to page one 71. This reads Sports and Activewear '81.

10 What is sports and activewear in this context?

11 A. Sure. As I mentioned before, our organized by category.  
12 This would be the sports and activewear category. Soccer  
13 training, football catalog from 1981. You'll note the three  
14 stripes on this one being used on the large Trefoil logo. The  
15 leaves of the Trefoil being different colors, red, yellow,  
16 black, running across that logo.

17 Q. Go to page 174. Identify these products and how the  
18 Three-Stripe Mark is being used.

19 A. Sure. You can see the track jacket on the left with the  
20 three stripes running down the length of the sleeve. Three  
21 stripes on the footwear as well. Three stripes on the child on  
22 the right running down the sleeve. There are three stripes in  
23 the logo on the shirt on the right. And you'll note there is  
24 three stripes in the logo on the jeans.

25 Q. Page 178, please. Just identify this catalog for us.

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1 A. Sure. This is adidas women's product catalog from fall of  
2 1989.

3 Q. Go to the next page within that catalog.

4 Identify the products here and where the Three-Stripe  
5 Mark appears.

6 A. Sure. These are products for cross training. You'll see  
7 on the tank top on the top, you have three stripes running  
8 horizontally around the chest. You'll see on the short, three  
9 stripes running across the side of the thigh. And then on the  
10 three quarter tight, you'll see them running horizontally  
11 across the knee area. And then on the tight on the lower  
12 right, you'll see them calf range running horizontally across  
13 the side.

14 THE COURT: Counsel, we're going to give the jury  
15 their lunch break at one o'clock. Find an appropriate stop.

16 MR. HENN: This is appropriate time as any.

17 THE COURT: Very good.

18 Ladies and gentlemen, we'll give you your lunch break  
19 now.

20 Please be back in the jury room by two o'clock, and  
21 we'll reconvene then. Have a good lunch.

22 (Continued on next page)  
23  
24  
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Murphy - Direct

1 (Jury not present)

2 THE COURT: Anything anyone needs to raise with the  
3 court?

4 MR. HENN: No, your Honor. Just what time would you  
5 like us back?

6 THE COURT: Well, unless we have something to discuss,  
7 two o'clock. If you're going to read into the record a whole  
8 bunch of exhibits, I don't know if you wanted to do that now or  
9 after lunch or you wanted to do it this evening.

10 MR. HENN: We'll just go as we've been going, I think,  
11 for today and try to streamline tomorrow.

12 THE COURT: That's fine.

13 Very good. See you at two o'clock.

14 By the way, I have to say, I thought both opening  
15 statements were excellent. Really looking forward to this  
16 case. Obviously, very good lawyers involved, and I can say  
17 that with total objectivity because I know I own nothing by  
18 either adidas nor Thom Browne.

19 MR. MALDONADO: Thank you, your Honor.

20 THE COURT: Thanks a lot.

21 (Luncheon recess)  
22  
23  
24  
25

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AFTERNOON SESSION

2:00 p.m.

(Jury not present)

THE COURT: There was something counsel wanted to raise?

MR. HENN: Yes, your Honor. During the break, I conferred with opposing counsel, and we can go ahead and agree to a number of Mr. Murphy's exhibits in advance.

THE COURT: Read the numbers.

MR. HENN: It's Exhibits 5 through 37, 39 through 42, 43 through 49, 51 through 56, 72, 73, 76 and 381.

THE COURT: Okay, received.

(Plaintiff's Exhibits 5 through 37, 39 through 42, 43 through 49, 51 through 56, 72, 73, 76 and 381 received in evidence)

THE COURT: Bring in the jury.

MR. HENN: One other issue.

THE COURT: Yes.

MR. HENN: The rule of sequestration typically applies to fact witnesses.

THE COURT: I'm sorry?

MR. HENN: The rule of sequestration of witnesses typically applies to fact witnesses. We have an expert witness --

THE COURT: No, it applies to everyone.

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Murphy - Direct

1 MR. HENN: Fair. All right.

2 THE COURT: And while we're on that subject, the  
3 Federal Rules of Civil Procedure were amended some years ago so  
4 that an expert can only testify as to what's in his or her  
5 report, and that is strictly enforced in my court. Therefore,  
6 there is no reason for the expert to be here in addition to  
7 being improper in my view for other reasons. All right?

8 MR. HENN: Fair enough.

9 (Jury present)

10 CHRISTOPHER GORDON MURPHY, resumed.

11 DIRECT EXAMINATION CONTINUED

12 BY MR. HENN:

13 Q. Mr. Murphy --

14 THE COURT: I'm sorry, to speed things along, counsel  
15 agree that certain exhibits will be automatically received,  
16 counsel for both sides. So if you don't hear us going through  
17 the "Any objection/received" language, it's because it's  
18 already been done for your benefit. Go ahead.

19 MR. HENN: Thank you, your Honor.

20 Q. Before the lunch break, Mr. Murphy, we were just wrapping  
21 up the collection from the 1980s. I want to pull up Exhibit 5  
22 and have you identify Exhibit 5 for us.

23 A. Sure. This is a catalog from spring 1990. It's the adidas  
24 boys catalog.

25 Q. The cover page, of course, is the catalog from spring of

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1 1990, but can you just explain what's contained in Exhibit 5 as  
2 a whole?

3 A. Sure. It's a collection of catalogs ranging from the 1990s  
4 and beyond.

5 Q. If we look over at page 12, can you identify what we have  
6 on this page and how the Three-Stripe Mark is being used?

7 A. Sure. This is a selection of kids soccer shoes and balls.  
8 You can see on all of the shoes the three stripes running down  
9 the side of the shoes. That's on both the cleated ones, as  
10 well as the non-cleated shoes. You also see the three stripes  
11 included. Then the logo on the balls, as well as the logos on  
12 the tongues.

13 Q. Go over to page 33. Can you identify this catalog for us?

14 A. Yes. This is our running catalog from fall/winter 1993.

15 Q. This catalog specifies running. What products would be  
16 contained in that catalog?

17 A. Typically products for both apparel and footwear  
18 specifically for running.

19 Q. If we go over to page 49. This one says equipment. What  
20 is contained in the equipment catalog?

21 A. In the equipment catalog, usually it's training apparel for  
22 both running or the gym typically.

23 Q. With regard to the products that are depicted on page 49,  
24 can you identify how the Three-Stripe Mark is being used there?

25 A. Sure. You can see within the tank top the three stripes

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1 running down the side of the tank top, then onto the shorts  
2 where it sweeps down to the back of the short.

3 On the footwear, you can see the three stripes being  
4 used both on the upper part of the shoe as well as on the  
5 bottom part, which is called the outsole.

6 Q. Go to page 82. Can you identify this catalog for us?

7 A. Yes. This is a 1997 track and field catalog.

8 Q. What was contained in the track and field catalog?

9 A. Sure. So we sponsor, obviously, quite a few universities',  
10 high schools' track programs, and we create product for all of  
11 them. This is a catalog that would contain product for those  
12 purposes.

13 Q. With regard to the product that is depicted on this page,  
14 can you identify where the Three-Stripe Mark appears?

15 A. Yes. You can see it on the shoulders of the tank top, as  
16 well as on the front of the shorts in a kind of a wavy pattern.

17 Q. Go to page 92. Would you identify this catalog, please?

18 A. This is a catalog from 1999. It's our soccer catalog.

19 Q. What is contained in the adidas's soccer catalogs?

20 A. Typically product utilized for the sport of soccer.

21 Q. With regard to the products depicted on the cover of this  
22 soccer catalog, can you identify the uses of the Three-Stripe  
23 Mark?

24 A. Sure. In the upper left-hand corner on the jersey, you'll  
25 see the three stripes wrapping around the sleeve of the jersey.

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1 You'll see the three stripes running down the side of the  
2 short. There are three stripes on the top of the socks, and  
3 three stripes on the footwear being featured.

4 On the right-hand side, you'll see three stripes being  
5 utilized on the soccer short wrapping around the shorts.

6 You'll also see three stripes on the socks as well as on the  
7 footwear there as well.

8 Additionally, in the lower right corner, you'll see  
9 three stripes running across horizontally the chest of the  
10 jersey. You'll also see three stripes running down the length  
11 of the short, three stripes at the top of the socks, and three  
12 stripes on the footwear as well.

13 Q. Go over to page 104, please. What do we have here?

14 A. Sure. These are a collection of low-top basketball -- not  
15 low top. There are high tops in there too. Of the pro model  
16 basketball shoes. On the top, you'll see three stripes running  
17 down the side of the shoe. You'll see in the middle section,  
18 you'll see the black maroon and black striping. There's also  
19 three stripes on the logo on the tongue of the shoe.

20 Q. If go over to page 135, can you identify the products in  
21 this catalog?

22 A. Yes. These are products for cross training, so that would  
23 be running or in the gym as we talked about before. You can  
24 see the tops, featured on the top of the page there's three  
25 stripes running horizontally around the ribs.



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1           As you move down the page, in the short, you see the  
2 three stripes running horizontally at the thigh level.

3           With the three-quarter type, you'll see the three  
4 stripes running across at the knee level.

5           And then with the tight, the lower left, you'll see  
6 three stripes running horizontally at the calf level.

7           Then you have the triathlon suit where you can see the  
8 three stripes running across the short.

9           Q. Go to page 140. Can you identify the product and the  
10 Three-Stripe Mark on these products?

11          A. Yes. These are warmups or track suits. You can see the  
12 three stripes being utilized on the top running across and down  
13 the shoulder. And on the pants you will see lower on the leg  
14 around the calf level running down the leg.

15          Q. Can we go over to page 142. If you will identify the  
16 products on the right-hand side and where the Three-Stripe Mark  
17 appears?

18          A. Sure. These are track suits as well typically for soccer.  
19 You'll see on the right-hand side, the tops have three stripes  
20 across the shoulders, and then you'll also see three stripes  
21 running down the side of the leg horizontally at the thigh  
22 level.

23          Q. Go over to page 144, please. Will you identify these  
24 products and point out the Three-Stripe Mark?

25          A. Sure. These are more warmups and track suits. You'll see

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1 the variety of three stripes being utilized.

2 Upper right-hand side, you can see three stripes  
3 running across the front of the sweatshirt. If you move lower  
4 right, similar pattern with the three stripes running across  
5 the chest.

6 Lower left, you'll see three stripes in a number of  
7 areas: Middle of the arm on the top, as well as middle of the  
8 chest.

9 And then the pants, you'll see three stripes running  
10 sideways at about thigh level.

11 Q. Go to 146, please. What do we have here?

12 A. These are shell pants -- pardon me -- shell jacket and  
13 lined pants. You'll see three stripes running down the sleeve  
14 of the jacket and running down the side or the pant leg of the  
15 pants.

16 Q. Go to 150, please. How is the Three-Stripe Mark used on  
17 these products?

18 A. These are sport products, so you have a hockey jersey on  
19 the top. You can see the three stripes running around the  
20 sleeve, as well as running around the waist of the jersey, also  
21 rugby jerseys, you see three stripes running around the arm of  
22 the rugby jersey.

23 Q. Go over to page 165. What do we have on this page?

24 A. We used to sponsor the Yankees for quite a long time.

25 These are products we create for the team. At the top, you see

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Murphy - Direct

1 three stripes running down the length of the front of the  
2 jacket with the Yankees logo in the middle.

3 In the middle, you'll see three stripes running down  
4 the length of the sleeve on the jacket.

5 At the bottom, you'll see three stripes running down  
6 from the neck to the mid-back on the back of the shirt.

7 Q. Page 172, please. Identify these products and where the  
8 Three-Stripe Mark appears.

9 A. Sure. These are running products. The tank top, you see  
10 three stripes running sideways around the ribs.

11 You'll see the split-leg short in the middle, the  
12 three stripes running down on both sides of the short from top  
13 to bottom on the front.

14 And then the baggy short on the bottom, you'll see  
15 three stripes running across the side of the short on both  
16 sides.

17 Q. And then the last page from this exhibit, page 176. Can  
18 you identify the products and the use of the Three-Stripe Mark,  
19 please?

20 A. Sure. This is a jacket and pant combination. You'll see  
21 on the jackets, you have three stripes running around just one  
22 of the sleeves, the left sleeve.

23 On the pant on the bottom, you'll see three stripes  
24 running across just the right leg -- the left leg, pardon me,  
25 that's the back, so just the left leg.

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1 Q. We can take Exhibit 5 down.

2 Moving from the Nineties now into the 2000s, if we can  
3 pull up Exhibit 6, what is contained in this collection marked  
4 as Exhibit 6?

5 A. This would be a collection of catalogs from the 2000s.

6 Q. Same exercise, Mr. Murphy. Starting with the cover here,  
7 where is the Three-Stripe Mark on the products?

8 A. Sure. This is a showcasing soccer product. You can see  
9 the three stripes running down the sleeve of the soccer jersey.

10 You can see three stripes at the top of the sock.

11 You can also see three stripes in two spots on the  
12 footwear, both on the side of the footwear or the top or the  
13 tongue of the footwear.

14 Q. Go over to page 5. What is depicted in this catalog page?

15 A. Sure. These are velour suits. You can see three stripes  
16 running down the sleeve of the tops and running down the side  
17 of the pants on the bottom.

18 Q. Page 6. How is the Three-Stripe Mark used on these  
19 products?

20 A. Sure. These are shorts and pants. You can see the three  
21 stripes on both sides of the pants -- pardon me -- both sides  
22 of the short running sideways. And similarly with the pants,  
23 you see the three stripes running horizontally at about calf  
24 level.

25 Q. Go over to page 13. Identify these products and the

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1 Three-Stripe Mark, please.

2 A. Sure. These are fleece hoodies and fleece pants. On the  
3 hoodies, you can see three stripes running down the length of  
4 the sleeve on both arms. And on the pants, you see three  
5 stripes running down the length of the pants both legs.

6 Q. Page 16, how is the Three-Stripe Mark used on the jackets  
7 at the top?

8 A. Sure. This is a lined jacket and a lined pant. On the  
9 jacket, you can see the three stripes being used to wrap around  
10 the shoulder area on the tops. And you see the three stripes  
11 on the pants running down three-quarters on the side of each  
12 pant.

13 Q. Go over to page 18. The product just at the top, what is  
14 that product?

15 A. That's a rain jacket.

16 Q. And the Three-Stripe Mark appears where?

17 A. It is running down the sleeve of the top on both arms.

18 Q. With regard to the product at the bottom identified as a  
19 brushed long tight. What is that?

20 A. A brushed long tight is a textured tight, so it's soft,  
21 utilized for working out in the gym or running. It has three  
22 stripes running down the side of the both sides.

23 Q. Go over to page 24, please. Can you identify the products  
24 on this page and where we see the Three-Stripe Mark?

25 A. Yes. These are basketball products. The basketball

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Murphy - Direct

1 products on top, you can see the three stripes running on the  
2 side of the shoes.

3 On the lower products, similarly, you can see the  
4 stripes running along the side of the shoe. In this case, we  
5 have tonals. You have white on white. We also have different  
6 colored stripes here with blue-red-blue, yellow-red-yellow, and  
7 orange-green-orange stripes.

8 Q. Go to page 44, please. Will you identify the products we  
9 have on page 44 and also point out the Three-Stripe Mark,  
10 please?

11 A. Sure. These are track tights and shorts -- pardon me --  
12 track shorts and pants used for running track and field.

13 On the shorts, you can see the three stripes running  
14 horizontally on the side of the shorts.

15 On the pants, you have the three stripes running  
16 horizontally as well as about thigh level.

17 Q. Go over to page 47, please. Can you identify this catalog  
18 for us?

19 A. Sure. This is our quarter one 2007 sport training catalog.  
20 Training would be, again, for gym or Yoga, things like that.

21 Q. With regard to the jacket that the woman on the cover is  
22 wearing, can you identify the Three-Stripe Mark for us?

23 A. Yes. The three stripes are running horizontally across the  
24 side of the sleeve.

25 Q. Go over to page 48. Can you identify the product in the

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1 top row and where the Three-Stripe Mark appears?

2 A. Sure. These are basketball pants and basketball shorts.

3 You can see with the pants, the stripes are quite a bit wider  
4 than we've seen previously. They're running down the length of  
5 the pants.

6 With the shorts, you can see the three stripes running  
7 down the side of each side of the shorts.

8 Q. Go over to page 61. What are these products?

9 A. So these are training for sport so these are, again,  
10 training products for the gym or any general sport activity for  
11 girls from our catalog from -- it's page 95. Pardon me.

12 If you look at the three stripes in the middle  
13 section, the leggings, you can see the three stripes running  
14 horizontally around the left leg.

15 And with the capri on the bottom, similarly the three  
16 stripes running around the left leg.

17 Q. Go to page 62. Will you identify this catalog for us?

18 A. Yes. We're a sponsor of the MLS, Major League Soccer. We  
19 create product for all of the teams. This would be a catalog  
20 that features that product.

21 Q. Look at the next page, and just identify the team, the  
22 product, and the Three-Stripe Mark?

23 A. Sure. This is a product for the Colorado Rapids team. You  
24 can see three stripes on both jerseys running about  
25 three-quarters of the way down the sleeve, mostly on the

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Murphy - Direct

1 shoulder.

2 And on the pants, you can see the three stripes  
3 running down the side of each leg of the shorts.

4 Q. Go over to page 80. Can you identify this catalog for us?

5 A. Sure. This is a running specialty catalog from fall/winter  
6 2011. Running specialty would be for accounts that we work  
7 with that are really geared toward very performance-based  
8 running, like a Runners World kind of store.

9 Q. Go over to page 82 in this catalog. Can you identify the  
10 products?

11 Nita, if you will blow up the long tight picture at  
12 the top. They are kind of hard to see.

13 A. So this is a running tight. You can see the three stripes  
14 running down each leg at the calf level.

15 Q. Can we go over to page 90. Can you identify this catalog  
16 for us?

17 A. Sure. This is the spring/summer 2012 adidas soccer catalog  
18 featuring products specifically for soccer.

19 Q. Who is the athlete depicted on the cover?

20 A. That's Lionel Messi. We have had a long-term partnership  
21 with Lionel Messi and the Argentina football club.

22 Q. Can you identify the use of the Three-Stripe Mark on his  
23 uniform there for us?

24 A. Sure. On the Argentina jersey, you can see the three  
25 stripes running about three-quarters of the way down the



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1 sleeve.

2 You can see three stripes on the side of the pant  
3 legs.

4 You can also see three stripes on the top of the  
5 socks.

6 Additionally, for the footwear feature, the Adizero  
7 F50, there you can see three stripes running horizontally  
8 across the side of the shoe.

9 Q. Go over to page 97. Identify these products and the  
10 Three-Stripe Mark, please.

11 A. Sure these are warmup tops and pants. On the tops, you can  
12 see the three stripes running horizontally across the chest and  
13 wrapping around the side of the shoulder.

14 On the pants, you can see the three stripes running  
15 down the length of the pant and on each side.

16 Q. Page 117, please. This is called a field catalog. What  
17 would be contained in a field catalog?

18 A. Field catalog would be for -- so we have accounts that we  
19 work with that are smaller. This would be product we created  
20 for them specifically.

21 Q. If we go to page 119. Nita, if you could maybe blow up the  
22 shorts from the top row.

23 Mr. Murphy, can you identify those products for us and  
24 identify the Three-Stripe Mark, please.

25 A. Sure. These are basketball shorts. You can see the three

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1 stripes running all around the right leg of the short  
2 horizontally.

3 Q. And then, Nita, if you will blow up the shorts at the  
4 bottom of that same page.

5 Same question, Mr. Murphy. Will you identify the  
6 product and the use of Three-Stripe Mark?

7 A. Sure. These are also basketball shorts. You can see the  
8 three stripes running around mostly the back of the short on  
9 each leg horizontally.

10 Q. Go to page 129. What products are on this page?

11 A. These are women's running products, shorts and tops.

12 Q. With regard to the shorts, where is the Three-Stripe Mark?

13 A. You can see the three stripes on both legs running from  
14 mostly around the back of each leg.

15 On the jacket, you can see the three stripes running  
16 around each sleeve both right and left.

17 Q. Go to page 151. This references tennis specialty. What is  
18 tennis specialty?

19 A. This would be product created for specifically accounts in  
20 tennis, accounts like Tennis Warehouse, those retailers that  
21 just sell tennis product.

22 Q. If you go to the next page. Will you identify the shoes  
23 depicted on page 152?

24 A. Sure. This is our popular Ubersonic tennis shoe. You can  
25 see the three stripes in two spots running across the shoe in a

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Murphy - Direct

1 blue-red-blue coloring, and then you can look at the bottom,  
2 and you see the three stripes included in the adidas logo as  
3 well.

4 Q. Nita, you can take that exhibit down. Thank you.

5 Mr. Murphy, we've talked a lot in these exhibits about  
6 the Three-Stripe Mark. How do you define the Three-Stripe  
7 Mark?

8 A. Three parallel stripes is how I define it.

9 Q. Does it matter how big they are or small they are to be the  
10 Three-Stripe Mark?

11 A. Nope. As we've just gone through all those products you've  
12 seen there, they show up in a variety of widths, a variety of  
13 colors and a variety of placements.

14 Q. Is the horizontal use of three stripes different from the  
15 vertical use of the three-Stripe?

16 A. It's not. We're the brand with Three Stripes.

17 Q. Just to be clear, how many Three-Stripe Marks does adidas  
18 own?

19 A. Only one.

20 Q. In addition to the Three-Stripe Mark, in a couple of the  
21 examples we looked at, you mentioned the stripes showing up in  
22 a logo form. I'd like to talk about those now. If we could  
23 pull up Exhibit 7. What is this?

24 A. This is the logo we use to identify our Lifestyle product.  
25 It's called the trefoil. You see it has three leaves. It has

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Murphy - Direct

1 three stripes running horizontally across the logo.

2 Q. Has it always been used just for Lifestyle product?

3 A. No, it's our Original logo. We used it a long time ago.

4 Some of the early catalogs you saw, Seventies in particular, it  
5 was used on all products and/or Lifestyle.

6 Q. You've mentioned Lifestyle several times. What is the  
7 Lifestyle division in adidas called?

8 A. It is called Originals.

9 Q. Can you pull up Exhibit 8, Nita.

10 In this compilation, Mr. Murphy, can you identify what  
11 we have in exhibit 8?

12 A. Sure. It's a collection of catalogs focused on the  
13 Originals product division.

14 Q. As we look at the cover of this catalog on the first page  
15 of Exhibit 8, can you identify the Three-Stripe Mark for us?

16 A. Sure. As I just noted, it shows up in the logo, so you can  
17 see it running horizontally within the Originals logo. You can  
18 also see it running across the page as well.

19 Q. Go over to page 5. What are these products?

20 A. These are our pro model and our Superstar, both iconic  
21 shoes. You can see the three stripes running across the shoes  
22 both on the top and the bottom, as well as in the logo on the  
23 tongue.

24 Q. The title of this is men's basketball, but I think you side  
25 these were Originals Lifestyle product. Can you explain?

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1 A. Sure. Because, like I said, the logo was used originally,  
2 the way we work with our teams to create Originals products or  
3 Lifestyle products, we often look back into our heritage, so we  
4 created a lot of great shoes for basketball like the Superstar.  
5 Many people don't know that the Superstar was originally an  
6 on-court basketball shoe. It has become more of a Lifestyle  
7 shoe over time. Although we call it a basketball shoe, it is  
8 worn for street and street culture.

9 Q. Go to page 225. Can you just identify this cover or this  
10 catalog for us?

11 A. Sure. This is a quarter one 2005 Originals footwear  
12 catalog.

13 Q. If we go to page 27, can you identify the products on this  
14 page?

15 A. Sure. These are old tennis products. So products that  
16 were built for players back in the Seventies and Eighties. So  
17 Nastase and Rod Laver were both famous tennis players. At one  
18 point these shoes were used on court by those players. They're  
19 now worn for style. You can see the three stripes running  
20 across the side of the shoe on the top, noting that the  
21 blue-red-blue pattern in the middle and green-black-green  
22 pattern on the right of the Nastase's on top.

23 Q. Go to page 53. Can you identify this catalog for us?

24 A. Sure. It's the quarter one 2009 adidas Originals men's  
25 catalog.

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1 Q. Go to page 54, the next page. Would you identify the  
2 products on this page?

3 A. Sure. These are Firebird Track top and pants, one of our  
4 more popular track suit combos. You can see the three stripes  
5 running down the side of both arms of the track top and both  
6 legs of the pant. And as I noted before, the oversized logo  
7 that you see on both top of the top and the pant also contains  
8 the three stripes.

9 Q. When adidas does the trefoil oversized, is that a different  
10 trefoil than the smaller trefoil, or is it all one?

11 A. It's the same, same logo.

12 Q. Let's go to page 108. Can you identify these products for  
13 us?

14 A. Sure. These are our everyday shorts. You can see the  
15 three stripes running down the side of the short, as well as  
16 the trefoil logo is there, so it's on the trefoil logo as well.

17 Q. The next page 109, what did we have here?

18 A. This is also a picture of the Superstar. This is three  
19 stripes showing across the side of the shoe as before, noting  
20 that the colors are the black-red-black on the top shoe. You  
21 also have gray-yellow-gray, black-blue-black and then you also  
22 show some of the tonal colors here where you see the three  
23 stripes going the black stripes on the black shoe and you also  
24 have the white stripes on the white shoe.

25 Q. Go to page 150. This references core apparel footwear and

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1 accessories. What does that mean?

2 A. Those are the most core products, the products that show up  
3 season after season over and over again, our most popular  
4 products typically. For apparel, footwear and accessories for  
5 quarter three 2016.

6 Q. What is the shoe that is depicted on the cover of this  
7 catalog?

8 A. That's the Campus, one of our more popular shoes.

9 Q. Go over to page 151, the next page. Can you identify these  
10 products?

11 A. Sure. These are a full zip hoodie Originals.

12 Q. How does the Three-Stripe Mark applied to the full zip  
13 hoodies we see here?

14 A. Sure. You can see on the sleeves, they wrap around the  
15 sleeve at about the cuff level, and you can also see the three  
16 stripes wrapping around the back of the product at the waist  
17 level.

18 Q. Then the last page for this exhibit, we will go to page  
19 190. We looked at an adult Superstar. Can you just identify  
20 what is on this page?

21 A. These are kids Superstars. Superstar is a very popular  
22 shoes so we make them for men, women, kids.

23 Q. Take that exhibit down. Thank you.

24 In addition to the trefoil, you mentioned the other  
25 logo. What do you call that?

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1 A. Badge of sport or the sport performance logo.

2 Q. Within the company, what does the badge of sport logo  
3 signify?

4 A. It's connected to all the products that would be used for  
5 sport specifically.

6 Q. And is that different from Lifestyle products?

7 A. It is. So Lifestyle is intended not for being used on the  
8 court pitch for a field, whereas the badge of sport and  
9 products associated with it are typically utilized in things  
10 like football, soccer, running, training at the gym.

11 Q. I want to next pull up demonstrative exhibit, Demonstrative  
12 1, Nita.

13 Can you just explain to the jury how the badge of  
14 sport was originally created?

15 A. Sure. Everything we do is about three stripes. So the  
16 badge of sport was created by taking three stripes vertically,  
17 shifting them 30 degrees. Big surprise we use three for that.  
18 Shifting them 30 degrees, cutting them off and creating the new  
19 badge of sport logo.

20 Q. You can take that down. Thanks, Nita.

21 Let's pull up Exhibit 10. It's another collection of  
22 catalogs here. Can you identify what is contained in Exhibit  
23 150

24 A. Sure. It's a collection of catalogs focused on our sport  
25 performance products or badge of sport products.



N13Qadi4

Murphy - Direct

1 Q. If we look at the products on the first page, can you point  
2 out the Three-Stripe Mark for us?

3 A. Sure. You can see the three stripes running down the side  
4 of the tank top, as well as down the side of the shorts.

5 Q. If go over to page 2, would you identify the products on  
6 this page and point out the Three-Stripe Mark?

7 A. Sure. These are running products, our Adistar products.  
8 You can see the three stripes running down the front of the  
9 short on both legs, as well as on the jacket running down the  
10 full length of the sleeve on both arms.

11 Q. If go over to page 52, can you blow up maybe the bottom row  
12 images, please. Thank you.

13 Mr. Murphy, will you just identify these products and  
14 point out the way the Three-Stripe Mark is used?

15 A. Sure. These are women's running tees, T-shirts. You can  
16 see the three stripes on the sleeve of the shirts on both arms.

17 Q. Go to page 57. Maybe grab the ones at the top there.  
18 Thank you.

19 Mr. Murphy, will you identify these and point out the  
20 Three-Stripe Mark, please?

21 A. Sure. These are our tees as well, T-shirts as well. Three  
22 stripes running on the shoulder of both shoulders, as well as  
23 within the larger sport performance or badge of support logo.

24 Q. Thanks. You can take that down, Nita. If you'll pull up  
25 Demonstrative 2.

N13Qadi4

Murphy - Direct

1           Mr. Murphy, we talked about the creation of badge of  
2 sport. Can you back up in time and talk about how the  
3 Three-Stripe Mark itself came to be?

4       A. Sure. On the exhibit, you can see a picture of our  
5 founder. That's Adi Dassler. I don't know if a lot of folks  
6 know this. A lot of people don't know that our name, adidas or  
7 adidas comes from his name. A lot of people think adidas, all  
8 day I dream about soccer or all day I dream about sports.  
9 That's not the case. It comes from his name, his first and  
10 last name being combined together. He was a cobbler in  
11 Germany, a small town called Herzogenaurach, or just Herzo for  
12 short. But he was a cobbler. He created shoes. He was very  
13 interested in creating shoes for sport and working to make  
14 athletes better through technology or advancements in footwear.

15           In the picture, you can actually see screw-in cleats  
16 for soccer. He's one of the first people to create screw-in  
17 cleats for soccer, noting that sometimes soccer fields are  
18 hard, sometimes they're soft, sometimes they're wet, and you  
19 need different sized cleats depending on that. He was the  
20 first person to create soccer cleats like this.

21           As he started to work with more teams like the German  
22 National Soccer Team or with athletes like the well-known  
23 runner Jesse Owens, he wanted people to know that he was the  
24 one creating those shoes. The way to do that was by putting  
25 stripes on the side of the shoes so that everyone would know

N13Qadi4

Murphy - Direct

1 that the person performing at their best in this innovative new  
2 shoe was created by Adi Dassler.

3 Q. Shifting gears slightly, Mr. Murphy, how does adidas and  
4 your team specifically go about advertising and promoting the  
5 Three-Stripe Mark?

6 A. Sure. As I mentioned before, that's literally my job, my  
7 team's job all day every day. And we use a number of methods  
8 to do that. We use traditional marketing efforts. So, like I  
9 said, the things you see on television, the advertisements you  
10 see on TV, through social media, you'll see our brand and our  
11 products show up on social media. You'll see athletes, like we  
12 showed earlier Lionel Messi wearing our shoes and our jerseys.  
13 You'll see influencers or artists like a Beyonce wearing our  
14 product regularly. We do a lot of work at retail. So if you  
15 walk around New York City and you look at a Foot Locker or  
16 Champs or you're on Fifth Avenue and you walk past our store,  
17 we market our products and our brand in the three stripes in  
18 all those environments as well.

19 We do lot of product placement. So we send product to  
20 people, some who are famous, some who are not famous, get them  
21 to wear our shoes as well. So a variety of ways that we get  
22 involved in marketing our brand and the three stripes.

23 Q. Approximately how much does the company spend on that  
24 advertising and marketing promotion of the Three-Stripe Mark?

25 A. Sure. It's obviously grown over the years as we have

N13Qadi4

Murphy - Direct

1 grown. If you think about the most recent few years, we are  
2 spending between 4 and a little over \$500 million a year in  
3 marketing adidas.

4 Q. Has that been consistent over the last decade, say?

5 A. For the most part. We probably, you know, I think about  
6 2010 to 2017, probably in the 200 to 350 range. And then  
7 growing over the past five years to get closer to 500 million.

8 Q. I want to pull up Exhibit 72. Nita, if you could scroll to  
9 the left on this Excel spreadsheet for us.

10 Mr. Murphy, can you tell us what's contained in  
11 Plaintiff's Exhibit 72?

12 A. Sure. This is exactly what you said; it's a finance  
13 exhibit. It's a spreadsheet managed by our finance team that  
14 looks at our yearly spend on marketing, marketing of the brand  
15 and the three stripes in our product.

16 Q. At the very top, it says total MWB, what does that refer  
17 to?

18 A. Sure. MWB stands for marketing working budget. That's the  
19 budget that my teams have to market the brand every year.

20 Q. Then there are three main categories: Brand assets, brand  
21 communications and sales support. Can you tell the jury what  
22 each of those categories is?

23 A. Sure. As you asked, how do we go about marketing the  
24 brand? If you see brand assets, that includes -- when I talked  
25 about sports marketing, so the money we spend on someone like

N13Qadi4

Murphy - Direct

1 Lionel Messi or Derek Rose or James Harden, that's called  
2 sports marketing.

3 Or on entertainment, influencer marketing contracts,  
4 that's would be Beyonce or some of the other influencers we  
5 work with.

6 You also brand communications. That would be some of  
7 the traditional things I talked about: TV advertisements,  
8 social media, digital advertising.

9 And sales support at the bottom is typically for  
10 retail marketing, so what you see at the retail doors I talked  
11 about before: Finish Line, Foot Locker or our store on Fifth  
12 Avenue here.

13 Q. I see the data begins in 2010. Nita, if you will scroll  
14 out to the right, a little farther.

15 This goes through 2019, correct?

16 A. Correct.

17 Q. And the numbers here seem to be in the thousands, but you  
18 were talking about millions. Can you explain?

19 A. Sure. Just basically when it's in the thousands, we add  
20 three zeros. It's a financial accounting piece they do. This  
21 is a million. So 2018, 503 million. 2019, 523.5 million.

22 Q. Got it. Okay.

23 Let's take this one down and put up Exhibit 73.

24 Mr. Murphy, will you just tell us what's different  
25 about Exhibit 73?

N13Qadi4

Murphy - Direct

1 A. So this is comparable. This goes a little bit further out.  
2 It goes into 2020 and 2021.

3 Q. Similar to the others, these numbers are actually in  
4 thousands. So if it says 399,502, that's \$399,502,000?

5 A. That's correct.

6 Q. The categories are the same with regard to Exhibit 73?

7 A. They are the same: Brand assets, brand communications and  
8 sales support.

9 Q. There are a couple of years where the numbers and exhibits  
10 72 and 73 are slightly different from each other. In case  
11 someone is really focused on that in the jury, can you explain  
12 why they might be different between 72 and 73?

13 A. Sure. There's what we plan for and then some things  
14 change. Best example Aaron Judge hits a lot of home runs in a  
15 year. When some of our sports marketing partners do really  
16 well, we have things in their contract for them to make more  
17 money. So Aaron Judge wins MVP, and goes on to win the World  
18 Series, we obviously give them more money.

19 THE COURT: I thought the only reason Aaron Judge hits  
20 so many home runs was because he was a judge.

21 Q. And why would that fact make one of these charts different  
22 from the other chart?

23 A. Because when we're budgeting for one year, we budget a  
24 certain amount, and then things like that happen, and we have  
25 to basically pay over and above into the next year in some

N13Qadi4

Murphy - Direct

1 cases.

2 Q. Got it. Okay.

3 Now that we've looked at the numbers, let's talk about  
4 the categories that you've mentioned in terms of how adidas  
5 advertises the Three-Stripe Mark. I want to start with what  
6 you call traditional advertising. What's contained in  
7 traditional advertising?

8 A. Sure. Traditional advertising is typically television  
9 advertising, print advertising -- so magazines, newspapers --  
10 and out of home or billboards. The billboards you see in Times  
11 Square is one example. You would also consider radio would be  
12 part of traditional advertising as well.

13 Q. Let's start with television video advertising. Describe  
14 the scope of where that's distributed these days.

15 A. Sure. The majority of the television advertising we do is  
16 live sports, so live NBA games on ESPN or Turner. NFL games on  
17 ESPN or Fox or ABC or NBC. We do some cable. So if you watch  
18 Comedy Central, if you watch, like I said, Turner, TNT, TBS,  
19 those are where we typically spend our money when it comes to  
20 traditional TV advertising.

21 Q. Back when you were first at the company 16, 17 years ago,  
22 what was the scope of adidas's television advertising with  
23 regard to Three-Stripe Mark.

24 A. Less money but comparable places: Live sports and cable  
25 where we spent the majority of our money.

N13Qadi4

Murphy - Direct

1 Q. Let's talk a little bit about how you go about making sure  
2 that Three-Stripe Mark shows up in television advertising.

3 A. It's very specific. It's very purposeful. Being the brand  
4 with Three Stripes and known for Three Stripes, it's very  
5 important that our brand comes across in the ads that we put  
6 out there. So when we talk about with our directors or  
7 producers or videographers, we make sure that they understand  
8 how very important getting those Three Stripes seen is. So  
9 we're very purposeful in the guidance that we provide to the  
10 teams that are capturing the ads for that. Additionally, our  
11 logo shows up and oftentimes in the beginning and the end of  
12 our TV slots to make sure people now this is an adidas  
13 advertisement.

14 Q. I am now going to play in a minute a video that we have  
15 marked as Exhibit 12. We are going to turn the sound down, so  
16 we don't hear all the sound in the ads. But as we play the  
17 Exhibit 12, if you will just point out to the jury how you went  
18 about doing that, how you made sure the Three-Stripe Mark was  
19 visible in these ads.

20 Nita, if you will play Exhibit 12.

21 A. This is a golf ad featuring Sergio Garcia on the left.  
22 You'll see the three stripes across the chest on the product,  
23 and then obviously, a great shot of the shoes at the end.

24 Next is from one of our forever sport campaigns or  
25 long sport campaigns, pardon me. Lots of three stripes there.



N13Qadi4

Murphy - Direct

1 Same here along the sport Olympic weight lifter. Three Stripes  
2 showing up across the singlet. Very purposeful. Very visible.  
3 The logo at the end which contains the Three Stripes.

4 This is Originals footwear campaign. Lots of three  
5 stripes with the product. Originals, the blue color is our  
6 main color for Originals, so a lot of the blue color.

7 This is a billboard we did. It's not really a  
8 billboard. It's a big blow-up shoe we put on top of a building  
9 in Los Angeles. Obviously, three stripes very prominent on the  
10 form, which is the shoe being featured.

11 This is also our Forever Sport campaign. Lots and  
12 lots of three stripes on this campaign.

13 These are footwear ads. that was Kevin Garnett for  
14 his shoe. We do ads in partnership with partners like Champs.  
15 You'll see one with Foot Locker as well right here. Three  
16 stripes on the box, very purposeful.

17 This is for our new cushioning technology A3. You'll  
18 see the three stripes show up quite a bit there as well.  
19 Another Foot Locker ad, three stripes on the shoe, three  
20 stripes on the wristband, three stripes very prominent there as  
21 well.

22 This is more cushioning, then more of the ad around  
23 our cushioning new running ad. You can see the three stripes  
24 on all the shoes, very prominent on the outside.

25 Again, another cushioning ad for A3.

N13Qadi4

Murphy - Direct

1 Another footwear ad featuring new technology  
2 basketball shoes.

3 There's David Beckham.

4 Some more Originals ads. Solid three stripes up  
5 there.

6 Soccer ad.

7 Three stripes on the jerseys and the shorts.

8 Originals ad featuring Missy Elliott

9 This is advertising for the World Cup.

10 This is advertising for Tracy McGrady, a new  
11 basketball shoe. You see three stripes on the shorts.  
12 Definitely on the shoe, the use of the three stripes on that.

13 Jersey and short together, that's T-Mac, Tracy  
14 McGrady.

15 Women's World Cup advertising for our players and the  
16 teams that we sponsor.

17 Training ad in partnership with one of our accounts,  
18 lots of three stripes on the shoes and across the legs pants.

19 Another Foot Locker ad.

20 This is a soccer spot we did. Lots of three stripes  
21 for tops and pants and shoes for soccer ads.

22 This is an ad we did for new climate cool shoes and  
23 top with Anna Kournikova. Impossible is Nothing is our big  
24 platform both back in early 2000s and a platform we use now.  
25 Lots of three stripes showing up there as well.

N13Qadi4

Murphy - Direct

1 Q. Thank you, Mr. Murphy.

2 A couple more ads just to identify the same exercise  
3 to show where the Three-Stripe Mark is used and how you went  
4 about making sure it was visible. We'll play Exhibit 18.

5 A. This is an ad we did for Foot Locker around a new  
6 technology that we built in partnership with Nassau. You see  
7 the kid floating obviously because of the Nassau connection.  
8 Very purposeful with making sure that the product sold at Foot  
9 Locker is showing up in the ad. So the top with the three  
10 stripes. The Uber driver with three stripes on the sleeves.  
11 Always important to showcase the shoe from the outside where  
12 the three stripes are the most prominent.

13 You can see our brand shows up in all of our spots as  
14 much as possible, three stripes as much as possible.

15 Again, done in partnership with Foot Locker.

16 Q. The next is Exhibit 19, and it's long. It's about three  
17 minutes long. I won't play the whole thing, but I will play  
18 the first minute or so, so you can describe what this was as it  
19 plays.

20 A. Sure. This is from a partnership we have with Jeremy Scott  
21 who is a famous designer in partnership with some -- who is  
22 launching a new shoe on our Forum platform, so Forum is a  
23 popular shoe that we make. He did some designs around that  
24 shoe, and we created a series with him doing interviews with  
25 other famous New Yorkers like Kid The Wiz in New York, so this

N13Qadi4

Murphy - Direct

1 is that three minute film of Jeremy Scott talking about how he  
2 helped discover Kid The Wiz and utilized them, and you'll see  
3 his product, the Forum shows up repeatedly.

4 He also did some work with some track suits. You can  
5 see the track suit he's wearing with the three stripes running  
6 down the length of the sleeve, and then Kid The Wiz also, him  
7 and all the dancers in his troupe also wearing Three-Stripe  
8 track suits with three stripes down the sleeve and the pant  
9 leg.

10 Q. At this point you can stop the video.

11 With regard to that kind of video three minutes long,  
12 that's not going on a TV spot during football games. How do  
13 you distribute that?

14 A. That's more digitally done. So a number of the ads you  
15 saw, some are definitely for television. Quite a few are for  
16 TV. The longer ones like that that is too long for TV -- TV  
17 spots are typically between 30 and 60 seconds. At three  
18 minutes, that's much better utilized for You Tube, social  
19 media, places like Facebook, Twitter and Instagram.

20 Q. Let's pull up and play Exhibit 20. If you will do the same  
21 thing, identify for us how you went about ensuring the Three  
22 Stripe Mark appears. And tell us what the ad was.

23 A. Sure. This is an ad we did around inclusivity, especially  
24 keeping girls in sport. So girls drop out of sport at a much  
25 faster rate than boys, so we've been working very hard over the

N13Qadi4

Murphy - Direct

1 past few years to stop that trend and did a television ad to  
2 help with that. So this is a feature of girls looking up to  
3 their idols in women's sports and women's dancing, stuff like  
4 that. So you'll see lots of three stripes throughout this  
5 across a variety of sports: Boxing, wrestling, running,  
6 dancing, all across the board. Basically showing young girls  
7 can be anything they want to be. It's not just about boys in  
8 sports. It's girls in sports too.

9 Q. One more. At this point, let's play Exhibit 21. And as  
10 this plays, do the same thing: Identify the ad and tell us how  
11 you worked the Three-Stripe Mark into the ad.

12 A. This is an ad we did during Covid. There wasn't a lot of  
13 sports going on and normally we'd be running a lot of TV on  
14 live sports. There were not a lot of sports happening, so we  
15 weren't running as many TV ads. But we did want to note that  
16 the places where we play sports are still there and will still  
17 be there when Covid is over, and to note that the training that  
18 is happening and the hard work that athletes are putting in is  
19 not going to be wasted or useless because sport will come back,  
20 and that we are all ready for sport to come back. That was the  
21 feature of this. This did run both on television and  
22 digitally. It features a lot of our key athletes like James  
23 Harden, as one example. We have a sponsorship with New Zealand  
24 rugby team. Manchester United. You probably recognize Damien  
25 Lillard from Portland Trail Blazers. We sponsored the Boston

N13Qadi4

Murphy - Direct

1 Marathon, which didn't happen that year. If you remember from  
2 Covid, they didn't have the Boston Marathon. Finished with the  
3 logo. So three stripes.

4 Q. While it would be fun to sit here and watch TV ads all day.  
5 I think I'll pause there. We've been looking at relatively  
6 recent ads. Can you talk about how long adidas has been doing  
7 video and television advertising?

8 A. I've been there, like I said, almost 17 years. We've been  
9 doing it ever since I was there, and I'm sure longer. When I  
10 first started working in basketball, one of my first thing was  
11 to help create ads for television featuring athletes.

12 Q. Why does the company invest in television advertising?

13 A. We want to reach as many people as possible. We target  
14 pretty much everybody. We want everyone to know our brand, to  
15 like our brand, and to purchase our brand. And TV is one of  
16 the best ways to reach the most people possible.

17 Q. You mentioned that print advertising was also part of  
18 traditional advertising. Do you still do print advertising?

19 A. We do some. It's less over the past five to seven years.  
20 Print advertising has declined. A big move obviously on to  
21 digital being more prominent. So less print, but we still do  
22 some, yes.

23 Q. Why do you continue to do print?

24 A. Similarly, print does have a good reach. It reaches a lot  
25 of people, and so with our desire to reach as many people as

N13Qadi4

Murphy - Direct

1 possible, we still look at all the marketing avenues and  
2 channels that allow us to do that, and print is one of them.

3 Q. When I say print, can you give some idea of where those  
4 printed material appear?

5 A. Sure. In places like you'd see ESPN The Magazine or Sports  
6 Illustrated are two of the better examples.

7 Q. Let's pull up Exhibit 22. Tell us what's in Exhibit 22,  
8 this collection that is marked Exhibit 22.

9 A. Sure. These are a collection of print advertisements.

10 Q. Starting with the first one, what is this ad and how is the  
11 Three-Stripe Mark incorporated into it?

12 A. This is an Originals ad, the Lifestyle brand I mentioned  
13 before. You can see the three stripes running down the length  
14 of the sleeve on the top, running down the length of the pant,  
15 as well as on the shoes being feature.

16 Q. Go over to page 8.

17 Can you identify this ad and tell us how the  
18 Three-Stripe Mark is used?

19 A. Sure. It's a print ad connected to our House Party  
20 advertisement from about five, six years ago. You could see  
21 the three stripes showing up on the sleeves of the hoodie of  
22 the track jacket and of the short-sleeve shirt being featured.  
23 You can also see the three stripes running down the length of  
24 the pant. You'll also note it's on the three logos, the two  
25 that have the word adidas underneath them. And then the middle

N13Qadi4

Murphy - Direct

1 one, you see it in the logo where the adidas is in there.

2 Q. Go over to page 10. Identify this ad and the Three-Stripe  
3 Mark is used.

4 A. It's an Originals or Lifestyle ad as well. The three  
5 stripes are showing up running down the sleeve of the top  
6 featured, and also on the skirt running down the length of the  
7 side of the skirt.

8 Q. Page 18, please. Can you tell us about this ad?

9 A. Sure. This is a Superstar print ad. The shoe we've seen  
10 quite a bit of, one of our more popular shoes. You can see the  
11 three stripes running down the side of both the outside of the  
12 shoe and the inside of the shoe on all of them, as well as you  
13 can see the gold on the tongue, the Originals logo there, and  
14 the three stripes run across that Originals logo.

15 Q. Go to page 21. Can you identify this ad for us?

16 A. Yep. I think you all saw in the videos we were showing one  
17 of our TV ads Forever Sport featured lots of three stripes  
18 running across apparel. This is the print ad that would  
19 accompany that. Oftentimes what we run on television, we will  
20 also do something comparable across all their mediums, across  
21 print, across social, across everything else. This is an  
22 example of a print ad tied to that Forever Sport campaign.

23 Q. Go over to page 22, please. Tell us also about this  
24 campaign and this ad?

25 A. Sure. I mentioned before some of the inclusivity ads we



N13Qadi4

Murphy - Direct

1 were running. One part we were running around the same time  
2 were ads for different size product, so we do what's call  
3 inclusive sizing, so sizing that matches all body types. This  
4 is one of the ads we did for that. You can see the three  
5 stripes running down the side of the leg. You can see the word  
6 adidas on the back.

7 Q. I want to know turn to Exhibit 23. Tell us what is  
8 contained in Exhibit 23.

9 A. This is a series of more print ads as well. It says  
10 slogans and campaigns, but it's tied to some of the ads we also  
11 run.

12 (Continued on next page)

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N13sADI5

Direct - Murphy

1 BY MR. HENN:

2 Q. And if we go to page four, for example.

3 A. Oh, right. Sorry. This is an example of the ads we've run  
4 over the years. Pardon me.

5 So this is a calendar that shows all the campaigns we  
6 run, basically from 2000 until 2020. And we name them. So I  
7 imagine things like Forever Sport or Impossible is Nothing,  
8 things like that.

9 These are large campaigns that we run to promote the  
10 brand, the three stripes, and particular products.

11 Q. And I jumped to page four, that is 2020. But if we go back  
12 to page three, can you identification which is on that page?

13 A. Sure. Same thing, large ads that we ran, marketing  
14 campaigns that we ran starting back in 1970. Again, I  
15 mentioned things like Impossible is Nothing, Forever Sport,  
16 which were run during the 2000s and up until now.

17 There were ones Back in the Game, things like Spirit  
18 of the Games around the 1984 Olympics. Earn Them, which was  
19 high-tech Earn Your Stripes a big campaign that we ran in the  
20 mid '90s. These are all large campaign ads we ran throughout  
21 the years.

22 Q. The exhibit itself goes in reverse chronological order.  
23 I'm going to go to page 49 and hit some on the way back.

24 Start at page 49, please. Can you tell us about this  
25 campaign, when it was and what it was?

N13sADI5

Direct - Murphy

1 A. Sure. This is from mid 1976. It's an ad for training  
2 shoes. In essence, it's a reason to purchase our products.  
3 You see the three stripes prominently showing up on both sides  
4 of the shoes, as well as on the heel of the shoe. We put our  
5 original logo on the heel of the shoe and on the tongue is the  
6 original logo again.

7 Q. Go to page 43. What was this campaign?

8 A. I missed that one before. In 1984 we ran a campaign around  
9 the Spirit of the Games. It was done to highlight athletes  
10 that revolve -- that we sponsor taking part in the games, as  
11 well as featuring teams that we sponsored as well. Yes.

12 Q. Were the three stripe -- was the Three-Stripe Mark used in  
13 that campaign as well?

14 A. Yes, absolutely. You can see in the ad there, you see them  
15 on the shoes, both on the inside and outside of the shoe. You  
16 can see the three stripes on the short and the singlet as well.

17 Q. Go to page 42. What was this campaign?

18 A. Sure. This is a basketball campaign from 1984 featuring  
19 two of our more classic, iconic basketball shoes. You can see  
20 the three stripes being used on the outside of both shoes as  
21 well as within the logo, the Trefoil logo, originals logo.

22 Q. Page 36, please. What is this campaign?

23 A. This is the Earn Them campaign, all about earning your  
24 three stripes. The idea here being that if you perform at your  
25 best, you can, like the best athletes that we sponsor, earn

N13sADI5

Direct - Murphy

1 your three stripes.

2 Q. If we go to 29. Identify this campaign for us.

3 A. Sure. This was an ad from 2000. It was focused on  
4 multiple categories. So soccer is featured on the right. It  
5 was around more than just soccer. And the idea here being,  
6 when you wear adidas, it makes you better. Comparable is what  
7 I talk with our founder, Adi Dassler. He created shoes to make  
8 athletes better. We created a campaign around that in 2000.  
9 If you wear our shoes, it will make you better on the field to  
10 play.

11 Q. Page 28. Tell us about this campaign.

12 A. Sure. This is for our originals category featuring the  
13 Trefoil logo. This is the idea that every Trefoil has a story.  
14 So because we create -- our originals product, again, taps into  
15 our history. So we talked about before superstars wore once  
16 basketball shoes. There is a story behind that. Every one of  
17 our products has a great story behind it. Stan Smiths were  
18 once worn by a great tennis player named Stan Smith. A lot of  
19 people don't know that, so this campaign was tied to telling  
20 those stories.

21 Q. Page 27. Tell us about this one.

22 A. We saw the campaign before. This was tied to a specific  
23 product technology called Climacool. Climacool was a  
24 breathable technology that we used in both footwear and  
25 apparel. It made the footwear breathe better, obviously

N13sADI5

Direct - Murphy

1 wouldn't sweat as much. Same with the apparel, that would make  
2 it you wouldn't sweat as much. Featured Anna Kournikova, a  
3 popular, famous tennis player at the time, using the iconic  
4 Marilyn Monroe scene standing over the grate in New York.

5 Q. Page 26. What was this campaign?

6 A. So this is from 2005. Kevin Garnett, one of the more  
7 popular players in the NBA. We sponsored Kevin and also  
8 sponsored the NBA at the time. This was the idea behind Kevin  
9 plays multiple positions on the court. Although he's seven  
10 feet tall, he can act like a point guard at times, act like a  
11 forward at times, a start at times. He's versatile.

12 We wanted to showcase that. You'll note the three-  
13 stripe usage on the -- behind on the lower image there. That's  
14 because we wanted to mirror what it would look like on an NBA  
15 court, since we were sponsored by the NBA and most NBA teams  
16 had three stripes all over the place in 2005.

17 Q. Page 25, please. Tell us about this campaign.

18 A. Sure. This is from 2004. This was one of our first  
19 iterations of Impossible is Nothing campaign. It's a campaign  
20 running now as well, Impossible is Nothing. The idea that, as  
21 a brand, we believe that anything is possible, that we're  
22 different from everyone else, that we see possibilities where  
23 others do not. We started this campaign working partnership  
24 with Muhammad Ali and his family foundation.

25 Q. Go to page 20. Tell us about this campaign.

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1 A. Sure. This is our 2009 World Cup campaign. This was the  
2 world Cup that took place in Brazil. We featured Lionel Messi  
3 in Argentina, sponsored both him and the Argentina football  
4 team. This was an ad that we ran for him. The idea being he  
5 is the spark for the team. He's the main key player on that  
6 team.

7 So you can see the three stripes running down the side  
8 of the short and the blue white blue pattern. You see the  
9 three stripes on the top of the sock, and you see the footwear,  
10 the three stripes running down the back of the heel.

11 Q. If we go to page 19. Tell us about this campaign.

12 A. Sure. This is from our celebrate originality campaign.  
13 You can see the three stripes being featured in the shoe. That  
14 is the superstar on the ceiling of the shoe. This was done to  
15 kind of showcase a house party kind of scene. If you wanted to  
16 come to the best house party in the world with the best  
17 athletes, with the best musicians, best artists, you would have  
18 to be wearing three stripes.

19 Q. And last one we'll look at is page seven. Tell us about  
20 this one.

21 A. Sure. This was from 2017. This was tied to the U.S. Open,  
22 the U.S. Open tennis tournament happening here in New York.  
23 This was connected to us not being quiet about wanting to  
24 change the world. This was connected mostly to climate change.  
25 We had a lot of key athletes, key influencers, Pharrell

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1 Williams, Stan Smith, a Dominic Thiem, Garbine Muguruza. In  
2 tennis, oftentimes in tennis, shh, be quiet, that is common.

3 We came out with a campaign opposite of that. It is  
4 important we're not quiet about important topics like climate  
5 change.

6 Q. You mentioned that in addition to these print ads that are  
7 part of these campaigns, you also do out-of-home or billboard  
8 advertising. Tell us about that in the overall marketing mix.

9 A. Sure. We still do quite of bit of billboard advertising.  
10 It still gets a lot of visibility. Again, visibility is key in  
11 marketing. We want as many people as possible to see our  
12 advertising, so we still do quite a bit of advertising.

13 Likely, being in New York, you likely see some of our  
14 advertising in Times Square and places like that.

15 Q. Let's pull up exhibit 24. Just tell us what we see in  
16 Exhibit 24.

17 A. Sure. We have -- we do a lot of work in Boston. We are  
18 sponsors of the Boston Marathon. We are very active in that  
19 city. This is an example of an ad for Forum, which is one of  
20 our original shoes that we ran in the popular street in  
21 downtown Boston. You'll note the three stripes obviously in  
22 three different places, on the socks, both the stripes and the  
23 logo, and then on the Forum shoe itself with the stripes and  
24 the logo.

25 Q. Is this typical of the type of outdoor billboard

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1 advertising you engage in?

2 A. This is.

3 THE COURT: Counsel, is this a good time to give the  
4 jury their midafternoon break?

5 MR. HENN: It is, your Honor.

6 THE COURT: Very good. We'll take a 15-minute break  
7 at this time.

8 (Continued on next page)



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1 (Jury not present)

2 THE COURT: Step down and we'll see you in 15 minutes.

3 (Witness temporarily excused)

4 Please be seated. So how much longer are you on  
5 direct?

6 MR. HENN: This witness is our longest witness. He'll  
7 consume the rest of the afternoon.

8 THE COURT: Well, that's quasi responsive.

9 MR. HENN: Hold on. I have a sense. I have some  
10 timestamps. Let me just see.

11 There are approximately two hours left.

12 THE COURT: OK. By the way, just in general, I will  
13 normally ask counsel for each side how long they are going to  
14 be. Normally this will be taken as just a ballpark. However,  
15 if we get into a situation where I think time is being wasted,  
16 then I'll demand a more firm amount.

17 We'll see you all in 15 minutes.

18 (Recess)

19 Please be seated. All right, counsel.

20 BY MR. HENN:

21 Q. Mr. Murphy, let's turn to another aspect of your job,  
22 digital marketing.

23 Tell us what is included in digital marketing.

24 A. Sure. Digital marketing includes running advertisements on  
25 websites like *espn.com*, on *sportsillustrated.com*. It includes

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1 things like search engine marketing, so that is if you type  
2 something into Google and search for it, adidas shows up first  
3 with an ad next to it. That's digital marketing.

4 Social media, so if you're on any social media  
5 environment and as you're scrolling, you see an ad from adidas,  
6 that is also within the digital marketing.

7 Q. In addition to running ads on social media, does adidas  
8 have its own accounts on social media?

9 A. We do, across all the major social network environments.  
10 So Facebook, Instagram, Twitter, TikTok, Snapchat, YouTube. We  
11 have accounts for our main brand, as well as for each of the  
12 categories that we talked about earlier. So adidas soccer,  
13 adidas football, adidas running. We have accounts for all of  
14 those as well.

15 Q. How long has adidas had those social media accounts?

16 A. Um, since the inception of the networks themselves. Given  
17 the size and scope of adidas, influence we have, when those  
18 networks started, very early years connecting with the Facebook  
19 team and being live on Facebook, early years with Twitter,  
20 Snapchat even now with TikTok, connecting with TikTok. We were  
21 live on those platforms really early.

22 Advertising came later. Not all of those platforms  
23 were ready to advertise. I know that's how most of them make  
24 their money now. When they first started, they were not set up  
25 to handle advertising. We were really early with all of them

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1 as well, so Facebook, Instagram, and Twitter in 2009, Snapchat  
2 and Pinterest in 2011, and TikTok in 2019.

3 Q. Let's pull up Exhibit 25. This is a collection of social  
4 media. I just wanted to have you walk through and identify  
5 some of these examples for us.

6 So if we go over to page two, for example, what do we  
7 have here?

8 A. Sure. This is the adidas originals Instagram handle. You  
9 can see at the time, followers, we would utilize this to push  
10 out key messages related to the originals category. You can  
11 see some footwear in there. You can see some campaigns we were  
12 running as well. You see multiple elements of the brand pushed  
13 out across that particular handle.

14 Q. Since you mentioned the followers, can you zoom in at the  
15 top so he can identify that number?

16 How many followers does this one adidas account have?

17 A. The adidas originals account, at the time of this,  
18 35.6 million and it's increased from there.

19 Q. Let's go over to page three. Again, if you'll just grab  
20 the top.

21 Mr. Murphy, will you identify this for us?

22 A. Sure. This is the main adidas Instagram account. This is  
23 where the larger brand messaging happens. So you'll see our  
24 collaboration with Allbirds being featured there, you'll see  
25 the United Against Racism campaign, you'll see our push against

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1 Black Lives Matter, connected to Black Lives Matter, you'll see  
2 the piece from COVID when we were selling masks. So this is  
3 during -- this is used for our larger brand marketing messages  
4 overall.

5 Q. Look over to page 11. Can you identify what this account  
6 is?

7 A. Sure. Along with larger brand handles and individual  
8 category handles, we do have some that are specific to cities  
9 that we do the most marketing in, like New York City. So we do  
10 have an adidas NYC Twitter handle which will focus on things  
11 that are more specific to what are happening in this key city.  
12 New York is one example.

13 Q. What about page 12, what do we have here?

14 A. Sure. This is the adidas originals Twitter handle. Again,  
15 this will be focused on content related to the adidas originals  
16 category.

17 Q. And finally, page 14.

18 MR. HENN: Nita, just grab the top half. Perfect.

19 Q. Tell us what we have here.

20 A. Sure. This is the overall adidas brand Facebook page,  
21 focused on multiple categories or bigger stories. At the time  
22 this was captured, it's featuring our latest launch of soccer  
23 cleats.

24 Q. And in terms of followers or likes on the Facebook account,  
25 how many?

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1 A. Sure. You can see on this one there's 32.6 million  
2 followers.

3 Q. Take that down. You mentioned a whole host of social  
4 media. You may have mentioned YouTube?

5 A. Yes.

6 Q. If not, do you also promote the Three-Stripe Mark on  
7 YouTube?

8 A. We do.

9 Q. Tell us about that channel and how you use it.

10 A. Sure. Comparable to the other ones, a little bit more  
11 video focused, obviously. That's where we push a lot of the  
12 content that we create that isn't fit for TV or is too long,  
13 we'll push through YouTube.

14 Q. Let's pull up Exhibit 26.

15 If you can identify Exhibit 26 for us?

16 A. Sure. This is our main YouTube channel focused, again, on  
17 larger brand campaigns. This is, at the time this was  
18 captured, featuring our adidas' All In campaign from about  
19 seven or eight years ago.

20 Q. You mentioned that in addition to having these accounts  
21 yourself, you also advertise on social media.

22 Can you give us an example of how that works?

23 A. Sure.

24 MR. HENN: You can take this down. Thank you.

25 A. Sure. Across all of our social media environments,

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1 including YouTube, if I want things to be seen by more people,  
2 it costs money. So I spend advertising money with each one of  
3 them to ensure that the videos that we create or the images  
4 that we push out are seen by as many people as possible, and  
5 that is advertising.

6 That, in essence, is as you're scrolling through  
7 Twitter or through Instagram or Facebook, in your feed, I want  
8 to show up in that feed, and so I spend money with those  
9 platforms to make sure that my ad shows up.

10 Q. I want to pull up Exhibit 27 and have you talk about this  
11 as an example of social media advertising.

12 What was the Nite Jogger campaign?

13 A. Sure. You can see from the logo it was an originals  
14 campaign that we did in partnership with Snapchat in quarter  
15 two of 2019. Nite Jogger was a launch of a very specific  
16 product, a shoe.

17 Q. Go to the second page. Can you just walk the jury through  
18 what this page is conveying?

19 A. Sure. So with Snapchat, we spent \$300,000 for them to  
20 create, in partnership with us, ads for the Nite Jogger which  
21 were then pushed out across the Snap platform. They then came  
22 back and said, Hey, as a result of your spend, you had  
23 110.9 million total impressions and a 13.4 million total reach.

24 In essence, with reach, that's how many people on  
25 the platform saw your ads. So this would tell you that

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1 13.4 million people on Snapchat saw our Nite Jogger ads.

2 Q. What is the difference between reach and impressions?

3 A. Impressions will count people twice. If the same person  
4 saw something multiple times, that counts as an impression.

5 Q. Got you. Look over to page 14. Can you identify what is  
6 on page 14?

7 A. Sure. These are the creative examples of the ads that we  
8 ran across Snapchat for the Nite Jogger product.

9 Q. Can you identify or discuss how you used the Three-Stripe  
10 Mark in your social media advertising?

11 A. Sure. The logo is ever present. So you can see the  
12 originals or the Trefoil logo which has the three stripes  
13 within it. You can also see three stripes in the pants in all  
14 of the ads. You can also see the outside of the shoe featuring  
15 the three stripes across the Nite Jogger shoe as well.

16 Q. Was the Nite Jogger the only campaign you ran on Snapchat?

17 A. No. We run a lot of ads on Snapchat. We run a lot of ads  
18 across all of the social platforms.

19 Q. Is what we're seeing in Exhibit 27 representative of what  
20 you have done on those other social media sites?

21 A. It's comparable. Every platform is different and the  
22 content you create for each platform is a little bit different.

23 Q. I want to pull up now Exhibit 76, another spreadsheet.  
24 Tell us what is in Exhibit 76.

25 A. This is an example of the amount of money that we spend

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1 across social media and the resulting KPIs. KPIs are key  
2 performance indicators. So if I spend this amount of money,  
3 what did that do for me as a brand or how many people saw it or  
4 how much revenue did it generate.

5 Q. The other spreadsheets we looked at where I think you said  
6 were in the thousands, so you added three zeros. These, I take  
7 it, are actual numbers?

8 A. These are actual numbers in millions.

9 Q. Just from 2016 through whatever year-to-date 2021 was, can  
10 you describe what the spend on social media was for adidas?

11 A. Sure. You can see, as the social media platforms have  
12 grown, as they advertising opportunities have grown, as we  
13 adidas North America have grown, you can see we've spent more  
14 money year after year going from approximately 1.2 million in  
15 2016 to approximately 37 and a half million in 2020.

16 Q. 2021 is lower because it's not a full year?

17 A. It's a year-to-date number, when this was captured,  
18 correct. It's not a full year.

19 Q. Got it.

20 MR. HENN: Let's take that down, Nita.

21 Q. The other component of digital, you said, was just Internet  
22 advertising. What do you mean by Internet advertising?

23 Describe what that looks like.

24 A. Sure. As anyone peruses the Internet, you will come across  
25 ads. We all do all the time. I spend money to advertise



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1 across a lot of sites that are relevant to things like soccer  
2 or basketball or originals. So our ads show up in quite a few  
3 spots across the Internet.

4 Q. And let's pull up Exhibit 28, so multipage exhibit. Just  
5 tell us what is contained in Exhibit 28.

6 A. Sure. This is a collection of ads that would run across a  
7 myriad of different sites. You can see different sites allow  
8 for different sized placements. Some allow for just logo  
9 placements, some allow for longer, we call skyscraper-type  
10 advertisements. These are different sized and feature  
11 different things based on what the site we are advertising with  
12 allows for in terms of size.

13 MR. HENN: Nita, would you grab the Good-bye Gravity  
14 ad in the middle at the top. Just pull that up.

15 Q. Can you talk a little bit about how you connect the video  
16 advertising that you might be doing in other places with  
17 Internet advertising you're doing?

18 A. Sure. I mentioned before we want as many people as  
19 possible to see our advertisements. So in the foot locker ad  
20 you saw earlier featuring the Good-bye Gravity with the kids  
21 floating, that one, we want you to see that on both TV, then  
22 when you go to the Internet to search around, I want you to see  
23 it again and again and again. Same with social, I want you to  
24 see it on social media as well.

25 So we run comparable ads across a lot of different

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1 environments. TV, down to this example, which is you seeing  
2 Good-bye Gravity, again featuring the same footwear, I see now  
3 on a different medium on digital.

4 Q. How long has adidas been engaging in digital advertising  
5 like the type we see in Exhibit 28?

6 A. Again, since I've been there 2017 -- I'm sorry. I've been  
7 there almost 17 years. Pardon me. We've been doing it for  
8 that long, at least.

9 Q. You can take this down. At the very beginning when I  
10 asked, sir, what your duties were, you mentioned sports  
11 marketing. You've mentioned Lionel Messi a few times going  
12 along. Describe or identify what you mean by sports marketing.

13 A. Sure. Sports marketing is where we work with athletes,  
14 teams, leagues, in a contractual form. We have a contract with  
15 Lionel Messi, and in that contract he agrees to wear our  
16 product when he is playing soccer, when he is off the pitch as  
17 well. He wears our product all the time.

18 We have that with a myriad of athletes, Lionel Messi  
19 being one example. James harden would be another one. Derrick  
20 Rose would be another one. With teams that we sponsor and  
21 partner with quite a few NCAA teams. Texas is one example,  
22 Nebraska, Rutgers.

23 We also partner with leagues, so we are league-  
24 sponsored on major league soccer. If you watch major league  
25 soccer, note that every team has three stripes on their Jersey,

1 on their socks, on their shorts.

2 Same with the NHL, National Hockey League. If you  
3 watch hockey, you note all the jerseys also have three stripes  
4 and the Batch of Sport logo on all of their jerseys.

5 Q. With regard to sport events, does that fall within sports  
6 marketing or is that another kind of marketing?

7 A. It can. Things like the Boston Marathon we talked about  
8 before, we sponsored the Boston Marathon. We are sponsors of  
9 the Brooklyn Marathon as well. We work with a number of large  
10 events, typically running events as well. That would be  
11 considered sports marketing too.

12 Q. Why does adidas engage in sports marketing?

13 A. Similar to our desire to have as many people see the three  
14 stripes as much as possible, when you sponsor athletes, you  
15 partner with athletes and sponsor and partner with teams. When  
16 you work with leagues or a big event, those three stripes show  
17 up on the field, on the pinch, on the court all the time. So  
18 the visibility is quite high.

19 Q. Let's pull up another collection. This is Exhibit 29.

20 We're going to do a similar exercise. Walk through  
21 certain pages of this, not the whole exhibit. And just I would  
22 like you to identify the athlete and how you've incorporated  
23 the Three-Stripe Mark into your marketing efforts with that  
24 athlete.

25 Start with page one.

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1 A. Sure. That's Lionel Messi, greatest soccer player in the  
2 world, just won the world cup. Obviously a younger picture of  
3 him. We have sponsored him a very long time, worked with him a  
4 very long time. That is him sitting next to a bronze statue of  
5 our founder, Adi Dassler. That image you saw before, this  
6 statue shows up in a number of our locations. We have one in  
7 Portland, our headquarters there. This is the one in Germany.

8 And the three stripes you can see showing up on the  
9 Argentina long-sleeve jersey that Messi is wearing, it shows up  
10 on the Argentina socks he's wearing, and they show up on the  
11 sides of the 0F50 football boot he's wearing.

12 THE COURT: I assume he contributes his success in  
13 soccer entirely to the fact that he's sponsored by adidas.

14 THE WITNESS: Yes.

15 MR. HENN: Adidas pays him handsomely to say that.

16 THE COURT: Got it.

17 BY MR. HENN:

18 Q. Let's jump over to page 42. Who do we have here?

19 And, again, talk about how you incorporate the  
20 Three-Stripe Mark with regard to this athlete.

21 A. Sure. This is David Beckham, also a well-known soccer  
22 player. This is part of our Impossible is Nothing campaign, so  
23 we asked him to be -- asked and paid him to be a part of our  
24 large brand campaign. This was both a video showed up on  
25 YouTube as well as *adidas.com*. And here you see him wearing a

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1 hoodie with three stripes running down the sleeve, as well as  
2 the Badge of Sport logo, which contains the three-stripe logo.

3 Q. Let's go over to page 47. Tell us about this image.

4 A. This is two images of the German Soccer Federation. As I  
5 noted, we sponsor teams. I mentioned Argentina before. We  
6 also sponsor the German national team. These are examples from  
7 tournaments. The Euro in the '80s up on top and at the bottom  
8 is the World Cup semi-final in Spain in the early '80s.

9 You can see three stripes on both jerseys running down  
10 the sleeve on both of them. You also can see in the lower  
11 picture of Germany, they played France in '82 in the semi-  
12 finals. And we at the time sponsored the France national team  
13 as well -- the French national team, pardon me.

14 Q. Let's jump over to page 53. Can you identify this athlete  
15 and talk about the three stripes?

16 A. Sure. This is Abby Dahlkemper. Abby plays for the women's  
17 national team, the women's national soccer team. You can see  
18 in this ad she is wearing a track top with three stripes  
19 running down the length of the sleeve.

20 Q. You said this was an ad. Is this, in fact, an ad?

21 A. It's not. Pardon me. This is Abby Dahlkemper's page on  
22 Instagram. I noted before that the reason we sponsor these  
23 athletes is so that they wear the product on the field.

24 Obviously we also want them to wear it not on the field. And  
25 we ask them, in some cases contractually, to post on social

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1 media regularly featuring our brand and the three stripes and  
2 our product.

3 Q. Let's look over at page 59. Who is that?

4 A. This is a famous track and field athlete from the '60s.  
5 This is Wilma Rudolph. You can see the three stripes on the  
6 track spike that she's wearing.

7 Q. Page 64. Who is that?

8 A. This is Haile Gebrselassie. Haile is one of the most  
9 decorated, long-distance runners in the world. He has won  
10 multiple Olympic medals, won multiple marathons. We work  
11 very closely with him and have for many, many years.

12 You can see the three stripes on the inside -- on the  
13 outside, pardon me, of the tank top he's wearing, running along  
14 the ribs.

15 Q. Page 66, please. Maybe zoom in on the photo. There we go.

16 Who do we have here?

17 A. This is Aaron Rodgers, posted this on his page. We sponsor  
18 Aaron Rodgers. You can see this is a number of football  
19 players in particular -- Jimmy Graham, JuJu Smith-Schuster,  
20 Aaron Rodgers obviously in there. He posted this at the time  
21 we were running a superstar campaign. We did a photo shoot  
22 with multitude of famous athletes, and Aaron took the image and  
23 posted it on his social media page.

24 Q. Page 68, please. Who is this and how do you incorporate  
25 the Three-Stripe Mark in connection with your work with this

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1 project?

2 A. This is Damian Lillard's Instagram page. Damian plays for  
3 the Portland Trailblazers, been a long-time partner with the  
4 brand. This was prior to the launch of his new Dame 7 shoe,  
5 and he highlighted that on his page.

6 You can see the three stripes showing up on the pants  
7 that he's wearing, running from the top of the pant to the  
8 bottom.

9 Q. Page 71, please. Again, maybe zoom in on the picture.

10 Can you describe for us what we -- who we have here  
11 and how the Three-Stripe Mark was incorporated in your  
12 relationship with that athlete?

13 A. Sure. This is James Harden, famous basketball player.  
14 When we first signed James Harden, to make sure that he had all  
15 the product he needed when he was playing basketball and off  
16 the court -- you see the original boxes and the lifestyle  
17 boxes.

18 We backed a semi truck up to his house and unloaded  
19 over 1,000 pairs of shoes into his house, put them in his  
20 closet, captured a lot of content about it. He was very  
21 excited to receive that many shoes, just to make sure that  
22 every time he leaves the house or does anything, he's wearing  
23 the three stripes.

24 We posted on social media about it. He posted on  
25 social media about it. A lot of media picked it up. It was a

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1 big story given the quantity of it shoes we gave James Harden.

2 Q. You mentioned the lifestyle box. Is that the blue one in  
3 there?

4 A. That's correct. You can see the three stripes being  
5 utilized not only on the footwear being shown, but also on the  
6 footwear boxes, you can see the sport performance boxes that  
7 usually have, in this case likely basketball, shoes mostly  
8 three stripes wrapped around the box. And on the originals  
9 boxes, the blue boxes with the Trefoil logo, you can also see  
10 the three stripes wrapping around the box.

11 Q. Thank you. You can take that one down, please.

12 Let's talk about influencers. You mentioned those.  
13 How do you incorporate the Three-Stripe Mark into your  
14 marketing with influencers?

15 A. Influencer marketing. So sports marketing is centered  
16 around athletes, leads and partners connected to sports  
17 typically. Influencer marketing is more connected to artists,  
18 musicians, in some cases designers, people more popular outside  
19 of sport. Examples would be Pharrell Williams and Beyonce are  
20 two of the bigger examples of partners that we have.

21 Q. Is that something that is relatively new or recent for the  
22 brand?

23 A. No, no. We've been doing influencer marketing for, again,  
24 nearly as long as I've been there.

25 Q. Let's pull up Exhibit 30, a collection of examples. And



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1 we'll, again, have you go through, just identify a few of them.

2 Start on page one. Pull up the picture for me. Who  
3 do we have here and how did you incorporate the Three-Stripe  
4 Mark into your relationship?

5 A. Sure. This is Beyonce. We work closely with her. We have  
6 a collection with her called Ivy Park. We promote that  
7 multiple times during the course of a year, both on all of our  
8 handles. This is adidas women's. At the time this would have  
9 been on every significant handle. She promotes it as well.

10 You can see the three stripes showing up on all three  
11 images. The one on the left on the sleeve, running from top to  
12 bottom of the sleeve, on the jacket, you see it's part of the  
13 hood. It also runs down the length of the jacket on the front.  
14 And on the right, the jacket has three stripes running all the  
15 way down the sleeve and all the way down the pant leg.

16 Q. If we go over to page three. Who is that and tell us a  
17 little bit about that relationship?

18 A. Yep. We've had a long-term partnership with Run DMC. If  
19 you know the song *My Adidas*, that is from Run DMC. Ever since  
20 then, we've had a great relationship and partnership with them.  
21 We do quite a bit of continued work with them around things  
22 likes the superstar, which we have seen a couple of times.  
23 That's the product that was featured in *My Adidas* as a  
24 superstar. This was tied to a campaign that we ran a few years  
25 ago around the superstar featuring Run DMC.

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1 Q. Go to page four. Who is that, and talk a little bit about  
2 the significance of this person?

3 A. Sure. As you see in there, it says some people think I am  
4 a shoe. Not many people know Stan Smith was once a famous  
5 tennis player. We made shoes for him.

6 He was originally a sports marketing athlete partner.  
7 He's become more of an influencer now. He no longer plays  
8 tennis, but he still is relevant because of his shoe.

9 We work closely with him quite a bit to create content  
10 around Stan Smith.

11 Q. Page six, please. Describe this for us.

12 A. Sure. This is an image of Stan Smith, I just talked about,  
13 with Pharrell Williams. We are in a partnership with, those  
14 two created a couple of tennis shoes.

15 So one is called the Pharrell tennis shoe and,  
16 obviously, the Stan Smith is an original shoe. Both original  
17 shoes rooted in the sport of tennis.

18 MR. HENN: Page eight, please, Nita.

19 Q. Who is this?

20 A. This is Rita Ora, musician. We had a partnership with her,  
21 did a product collection with letter as well for originals.

22 You can see three stripes in a number of spots here.  
23 On the sleeve of the jacket running from about three quarters,  
24 a quarter of the way down, all the way through the sleeve,  
25 three stripes are showing up across the ribs, and you see the

N13sADI5

Direct - Murphy

1 three stripes on the pants wrapping around near the calf.

2 (Continued on next page)

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N13Qadi6

Murphy - Direct

1 Q. Page 10, please. Can you identify this person?

2 A. Sure. This is Kylie Jenner. We partnered with both Kylie  
3 and Kendall over the years. This is affected to a product  
4 called The Falcon that we worked on in partnership with Kylie.

5 Q. Page 11. Who is that? Talk about that relationship,  
6 please?

7 A. Yes, that's Snoop Dog. We've had quite a few partnerships  
8 with him over the years. Been a long term supporter of his and  
9 vice versa. This is also tied to the adidas originals campaign  
10 that we talked about.

11 Q. And then the last one in this exhibit, page 13. Can you  
12 identify the person the adidas related person and also describe  
13 the circumstance of this?

14 A. This is Megan Thee Stallion, we've had a partnership with  
15 her in the past. This is her -- someone else is posting about  
16 this. You could see she's wearing a three-stripe outfit in the  
17 content that's featured here.

18 Q. You can take down Exhibit 30. A lot of that was in the  
19 context of social media posts.

20 Do you also incorporate your influencers and athletes  
21 into video advertising?

22 A. **Yes. In most of our TV spots, they will feature athletes**  
23 **or influencers. A lot of the content we create for You Tube or**  
24 **social media video content, in particular, will feature our**  
25 **athletes and influencers.**

N13Qadi6

Murphy - Direct

1 Q. I'm going to play two ads here. We'll break between them.  
2 But we'll play it without the sound as we did before. If you  
3 will just identify who we're seeing. You don't have to name  
4 every single person, but if they are key influencer  
5 relationships or spokesperson relationships, we'll start with  
6 those. Plaintiff's Exhibit 17.

7 A. This is one of our adidas Originals campaigns, celebrating  
8 60 years of Originals. Obviously, the first image is of Adi  
9 Dassler and a mural being painted with him. He's our founder,  
10 featuring him first. This is tied to our House Party campaign.  
11 A lot of these folks are on their way to what you would call  
12 the best house party ever. There's Run from Run D.M.C. showing  
13 first, the idea here being if you want to go to the best party  
14 in the world, you need to have on three stripes. You'll even  
15 notice that the invitation itself had three stripes on it. So  
16 as you look around the room, you'll see notable -- there's Mary  
17 J. Blige. There's notable David Beckham. Katy Perry.

18 Q. Can you also describe how this was distributed?

19 A. Sure. This was one of our more significant TV campaigns.  
20 This ran across mostly cable, a lot of cable, less live sport.  
21 Also a lot on You Tube and Instagram and Facebook at the time  
22 we ran it. Missy Elliott is there as well. Missy again.

23 Q. Nita, I think they get the point. We could pause that one.

24 One additional video, Exhibit 31, please.

25 A. This is an ad we ran a few years ago just before

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Murphy - Direct

1 Thanksgiving during our Creativity campaign. We brought some  
2 of those creative people across sport and culture together to  
3 talk about the importance of being creative: Pharrell, Messi,  
4 2 Chainz. That's Yvonne Miller. Derek Rose. The Avika  
5 Sisters are there. And there's Pharrell again. That's Paul  
6 Pogba. David Beckham. Damian Lillard. That's Karlie Kloss.  
7 James Harden. Aaron Rogers.

8 Q. Nita, thanks. You can pause it there.

9 A. We ran that one heavily across TV, based on the people  
10 featured. It was during Thanksgiving, a lot NBA basketball  
11 games, a lot of NFL football games, that ad showed up in all of  
12 those.

13 Q. Again, we've looked at a couple of relatively recent  
14 examples. Is it a new thing to use influencers and athletes in  
15 the ads that you're running on television or other video  
16 sources?

17 A. No, it's very common.

18 Q. Have you been doing it for many years?

19 A. Many years. As long as I've been there.

20 Q. I want to talk next about product placement. Can you  
21 describe what that concept is?

22 A. Sure. When we launch new products or we have a new  
23 campaign, we talked about the Superstar campaign a couple of  
24 times, we will what we call seed product, which means we give  
25 product to a lot of people, send it out, especially to people

N13Qadi6

Murphy - Direct

1 who are influential, not just the ones we pay. Because the  
2 ones we've seen for sports marketing and influencer marketing  
3 are typically people that we pay and have contracts with. We  
4 also send product to a lot of people who we don't have  
5 contracts with, in the hopes that they wear it. They are  
6 likely influential because they're famous. They're actors,  
7 actresses. They are musicians. They're artists. They're  
8 people who have large social media followings. They're social  
9 media influencers. We send a lot of that product out in the  
10 hopes that those people wear the product, are seen by media or  
11 publishers or photographers or paparazzi and/or they wear it  
12 and cover it themselves. They're excited about wearing our  
13 product and so they cover it on social media themselves, and we  
14 do this very regularly.

15 Q. Does the company maintain copies of product placements when  
16 they see them out in the marketplace?

17 A. Yes, we have a list of people we send product to. It  
18 varies. We send soccer product to people who are influential  
19 in soccer; running product to people influential in running;  
20 Originals product to a broader set of people because Originals  
21 and style covers are a broader subset of folks.

22 Q. Why keep track of when those things are successful?

23 A. We want to know, one, are they wearing the products. And,  
24 two, we want to also know, our efforts because it does cost us  
25 money to send product to people. The product isn't free to us.

N13Qadi6

Murphy - Direct

1 We have to send it to folks. We want to know if the effort  
2 we're putting in is being successful or is working. So we  
3 track if they're posting, and we track the volume they get. So  
4 if someone who is famous posts about our product, they have  
5 30 million followers, I then can track that as, hey, that's  
6 30 million people seeing the product that I sent to that  
7 person.

8 Q. We've got a video that I would like to show, which is  
9 Exhibit 32.

10 This is a collection of examples of product placement  
11 which we would offer into evidence at this time, your Honor.

12 THE COURT: Yes.

13 (Plaintiff's Exhibit 32 received in evidence)

14 Q. Thank you. Nita, if you can play that. You can play it  
15 with the sound because he doesn't need to narrate it.

16 (Video played)

17 THE COURT: We only offer the best musical  
18 entertainment.

19 Q. We won't make you remember every film that was in that, but  
20 just so we have a record of what was in that, can you identify  
21 some of the films that identify the Three-Stripe Marks?

22 A. Sure. *Life Aquatic*, *Royal Tenenbaums*, *Beverly Hills Cop I*  
23 *and II*, *Police Academy*, *Water Boy*, quite a few.

24 Q. Another area you mentioned within your title of brand  
25 marketing is retail marketing. Can you tell us what you mean



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Murphy - Direct

1 by that?

2 A. Sure. We own and operate over 130 doors in the United  
3 States.

4 Q. You say doors, you mean --

5 A. I mean retail doors. Thank you.

6 Q. Stores?

7 A. I call them doors. Stores. We own and operate over 130  
8 retail stores in the U.S. We also work with wholesale partners  
9 like Foot Locker, Finish Line, Champs, and we work with our  
10 retail partners to make sure that the brand shows up the way we  
11 want. So if you walk past Fifth Avenue, our retail store on  
12 Fifth Avenue. In the windows there are screens, and you'll see  
13 videos playing in those screens that are marketing product or  
14 brand campaign. You'll also note that there's logo placement  
15 in a lot of the spots. Some of the athletes we talked about,  
16 the influencers we talked about will also show up in those  
17 stores. So we do a lot of marketing in those retail stores,  
18 both our owned and operated ones, as well as ones from our  
19 partners.

20 Q. Let's pull up Exhibit 33. First, can you identify what the  
21 document is?

22 A. Sure. This is a 2015 marketing update.

23 Q. If we go over to page 77. Describe for us what you have  
24 here in the context of retail marketing.

25 A. Sure. This is an example of what we call a shop and shop.

N13Qadi6

Murphy - Direct

1 So it's a space that we have -- and by we, I mean adidas has --  
2 within Dicks Sporting Goods that is dedicated to our products  
3 and our brand. You will see this features C.J. Spiller, former  
4 running back from the Buffalo Bills next to our logo. It  
5 features an are Aeroknit piece, which was the product that we  
6 were selling at the time. We had this in 102 doors in 2014.  
7 When I say 102 doors, 102 total stores.

8 Q. Let's jump over to page 81. Describe what this is.

9 A. This is an example of a shop in shop within Foot Locker.  
10 Similarly, it's a space that we have for both Performance and  
11 Originals products. You can see both logos being featured,  
12 featuring Derek Rose on the left. We had these shop in shops  
13 in 150 doors in 2015. 150, pardon me, Foot Locker stores.

14 Q. You're looking at a deck from 2015. Is this something the  
15 company did prior to 2015?

16 A. Yes.

17 Q. Is it something the company still does today?

18 A. Yes, very much so.

19 Q. Are these very much representative of those other years as  
20 well?

21 A. They are.

22 Q. You mentioned I think one of the New York stores. Let's  
23 pull up Exhibit 34. Talk to us about how you incorporate the  
24 Three-Stripe Mark into adidas's own stores.

25 A. Sure. This is an example from our Wicker Street store here

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Murphy - Direct

1 in New York. You see in the front of the store, there's an  
2 example of our retail marketing for our Love Unites campaign,  
3 which we ran during Pride month pushing -- featuring product  
4 from that campaign, which is the running shoe you see in the  
5 front there. And then if you look further in the back of the  
6 store, you can see the three stripes showing up on the footwear  
7 wall running down the full length. That's where the three  
8 stripes show up in that particular door.

9 Q. If we go to page 2, can you describe how the Three-Stripe  
10 Mark is incorporated into this store?

11 A. Sure. This is one of our mall-based stores. You can see  
12 again the Love Unites campaign showing up in the two windows,  
13 again, tied to our campaign during Pride month. You also see  
14 the Three-Stripe Mark shows up in both of the logos, the one  
15 over the middle of the door and the one hanging to the side.  
16 We also have three stripes running down the length of the door.  
17 That's intentional, particularly to capture the reflection off  
18 of the flooring there. That was a decision we made to put  
19 those three stripes in that door because of the reflection and  
20 the ability of the three stripes then to extend out beyond the  
21 inside of the door.

22 Q. If we go over to page 4. Identify this for us and describe  
23 how the Three-Stripe Mark is used at this retail location.

24 A. This is our Fulton Street store here in New York as well.  
25 Again, you see the three stripes showing up in both logos, the

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Murphy - Direct

1 one directly above the door, the one on the sign to the side.

2 You'll also note that we use three stripes around the sign on

3 the right, on the top, on the side and on the bottom. And then

4 you can see the use of the three stripes starting from

5 underneath the adidas logo running down the building and then

6 inside and then down the wall.

7 Q. You mentioned the Love Unites campaign. Is that an example  
8 of purpose marketing?

9 A. That would be an example of purpose marketing.

10 Q. What is purpose marketing, more generally?

11 A. Sure. Purpose marketing for us incorporates two areas:

12 Inclusivity. So we have a strong desire to be known as an

13 inclusive brand, inclusive meaning anyone can participate in

14 sports, regardless of gender, sexual, orientation, et cetera.

15 And sustainability is another key area. We do marketing

16 efforts around both of those, around inclusivity and

17 sustainability.

18 Q. Let's look at Exhibit 35. If we could go to page 3, and  
19 identify this for us, please.

20 A. Sure. This is our Love Unites campaign which we ran during

21 Pride month. This is in our Fifth Avenue store here in New

22 York. You can see the three stripes showing up in the product

23 that we created for this campaign. That product, a large

24 number of those proceeds go back to our partner at the LI who

25 will promotes LGBTQ equality in universities.

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Murphy - Direct

1 Q. Thank you. I've got a ten second video, so there's not  
2 time for you to narrate while it's playing. Talk to us about  
3 the Kermit The Frog/Stan Smith video we're about to see.

4 A. Sure. I mentioned the inclusivity part. Sustainability is  
5 another big thing for us. We make a lot of products, and we  
6 want those products to be helpful when it comes to the planet,  
7 not less helpful. You can't play sports when the planet is not  
8 the way you want it to be, so we are very much invested in  
9 being a more sustainable brand. Stan Smith is one of our most  
10 popular shoes, which we talked about earlier. A couple years  
11 ago we created a more sustainable version. The materials are  
12 more sustainable. Less glue being utilized. It was a more  
13 eco-friendly shoe. To promote that, we created a series of  
14 videos with Kermit The Frog. Obviously, he's known for being  
15 green, hence, the sustainability piece, and we did it with Stan  
16 Smith, the person who is named for the Stan Smith shoe.

17 Q. Nita, if you'll play Exhibit 36 with the sound.

18 (Video played)

19 Q. Talk a little bit about how those videos were distributed?

20 A. We created quite a few of them. That was one example.  
21 Those were distributed mostly across You Tube. We put quite a  
22 bit of money behind those to make sure people saw them.

23 Q. You mentioned a component of the marketing mix for the  
24 company is PR or communications work. Can you describe how the  
25 company engages in that activity?

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Murphy - Direct

1 A. Sure. PR, or public relations, that's work that we do with  
2 publications with editors, news editors in magazines or online  
3 publications in an effort for them to cover our brand, either  
4 because of a products launch that we have or brand campaign  
5 that we have, we want them to write about that. So we send  
6 them information, written contents of videos or otherwise in  
7 the hope that they, because of the relationships that we have  
8 or the quality of content, that they write about us. That's  
9 typically called public relations or earned media. We're not  
10 buying it. We're trying to earn it.

11 Q. Do you also benefit from unsolicited media?

12 A. Yes, we do. A lot of the work we do with athletes or  
13 partners or product collaborations, media will often write  
14 about that regardless of us pushing or trying. Given the size  
15 and scope and how well-known we are as a brand, we often  
16 receive quite a bit of unsolicited editorial coverage.

17 Q. Does the company track that?

18 A. We do.

19 Q. Does it maintain it in the ordinary course?

20 A. It is. We do. We track it. We look at what's called  
21 share voice. I want to see how much I'm being talked about  
22 across the internet, across the editorial landscape, to get an  
23 idea, is it going up or is it going down? Are the things that  
24 I'm doing as a brand marketing organization working so more  
25 people are talking about us, or less people. What I want to

N13Qadi6

Murphy - Direct

1 know if what I'm doing is being effective.

2 THE COURT: So do you want to break now or do you  
3 prefer to use the full 90 seconds you still have?

4 MR. HENN: I have one exhibit on this point, I wonder  
5 if we should bang that exhibit out so we break at a rational  
6 point.

7 THE COURT: I think we should leave that for tomorrow.

8 MR. HENN: Fair enough.

9 THE COURT: Ladies and gentlemen, we are off to a good  
10 start. Thank you for your attention.

11 Tomorrow we will start at 9:45 because of another  
12 matter I have at 9:00. Don't take this as a precedent. We  
13 will normally start at 9:30, but tomorrow 9:45. But what is  
14 important that you all be in the jury room before 9:45. So we  
15 can start promptly on time because we can't start unless all of  
16 you are here. Have a good evening. We'll see you all tomorrow  
17 at 9:45.

18 (Jury not present)

19 (Witness excused)

20 THE COURT: I have another matter. You may have seen  
21 the door open there. That's to the cell block. You'll be glad  
22 to know they weren't looking for you guys, but I do have  
23 another matter starting right away. So unless there's anything  
24 urgent, why don't you come in at 9:30. I think my 9:00 matter  
25 should be over by 9:30. So come in at 9:30, and we'll start

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Murphy - Direct

1 then. See you tomorrow.

2 (Trial continued January 4, 2023 at 9:30 a.m.)

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